Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-1581

BALTIMORE & OHIO RAILROAD CO.

and

WESTERN MARYLAND RAILWAY COMPANY,

Appellants,

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY,

and

UNITED TRANSPORTATION UNION,

Appellees.

On Appeal From the Supreme Court of Pennsylvania.

JURISDICTIONAL STATEMENT.

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v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR & INDUSTRY,

AND

UNITED TRANSPORTATION UNION,
Appellees.

—

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

—

JURISDICTIONAL STATEMENT.

OPINIONS BELOW.

The opinion of the Supreme Court of Pennsylvania is set forth in the Appendix, *infra* pp. A4-A25. The opinion of the Commonwealth Court of Pennsylvania is reported at 12 Pa. Commonwealth Ct. 292 (1974) and is set forth in the Appendix, *infra* pp. A26-A37. The Recommendations and Findings of Hearing Examiner, and Order of the Commonwealth of Pennsylvania, Department of Labor & Industry, are set forth in the Appendix, *infra* pp. A38-A63.

JURISDICTION.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2), this being an appeal which draws into question the validity of Pennsylvania Act No. 43 of 1971 *infra*, p. 3, on the ground that it is repugnant to the Constitution of the United States.

On April 5, 1973, Appellants, interstate railroads, were ordered by the Pennsylvania Department of Labor & Industry to change the pay intervals of certain of their employees from bi-weekly, which was customary, to weekly, pursuant to the provisions of Pennsylvania Act No. 43 of 1971, [43 P.S. § 255.1 (Supp. 1972)]. On appeal, the Commonwealth Court of Pennsylvania held that the Railway Labor Act, 45 U.S.C. § 152 et seq. (1926), had preempted State regulation of changes in working conditions of railroad employees, including pay intervals, and on February 11, 1974, set aside the order of the Pennsylvania Department of Labor & Industry. On further appeal, the Supreme Court of Pennsylvania reversed the Order of the Commonwealth Court, holding, *inter alia*, that Pennsylvania Act No. 43 of 1971 was neither in direct conflict with nor preempted by the Federal Railway Labor Act. This matter is thus appropriately brought to this Court by appeal. See e.g. *Terminal Railroad Association of St. L. v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943).

In the event that the Court does not consider appeal the proper mode of review, Appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case involves Article I, Section 8, Clause 3, and Article VI, Clause 2, of the Constitution of the United States.

This case also involves Pennsylvania Act of July 14, 1971, P.L. 221, No. 43, 43 P.S. § 255.1 (Supp. 1972) entitled "An Act Regulating the Time of Payment of Wages and Earnings of Railroad Employees", which provides that

> "Unless otherwise stipulated in the contract of hiring or in the applicable labor agreement, every common carrier by railroad or corporation or joint stock association, operating as steam, electric, or diesel service railroad, or engaged in the sleeping car business, or carrying on the business thereof by lease or otherwise, shall pay once each week to each employee, the wages earned for the seven-day period ending not more than fourteen days prior to such payment period. Wages as the term herein is used shall be limited to those derived from basic pro rata rates of pay pursuant to the labor agreement, and shall not include incentive, bonuses, and other similar types of fringe payments."

QUESTIONS PRESENTED.

1. Whether Pennsylvania Act No. 43 of 1971 directly conflicts with the Railway Labor Act and is therefore unconstitutional and invalid under the Supremacy Clause of the United States Constitution; and

2. Whether Pennsylvania Act No. 43 of 1971 has been preempted by the Railway Labor Act and is therefore unconstitutional and invalid under the Commerce Clause operating in conjunction with the Supremacy Clause of the United States Constitution?

STATEMENT OF THE CASE.

This is an administrative proceeding by the United Transportation Union ("UTU") against the Baltimore & Ohio Railroad Co. (B&O) and the Western Maryland Railway Company ("Western") to compel the railroads to pay their employees weekly rather than bi-weekly, pursuant to the requirements of Pennsylvania Act No. 43 of 1971, entitled "An Act Regulating The Time of Payment of Wages and Earnings of Railroad Employees."

The UTU is a national railroad labor organization formed as a result of the merger of four former such organizations on January 1, 1969. The four organizations had been the Order of Railway Conductors and Brakeman, the Brotherhood of Locomotive Firemen and Enginemen, the Brotherhood of Railroad Trainmen and the Switchmen's Union of North America.

Prior to June, 1959, appellants' employees represented by the predecessors of UTU were paid on a semi-monthly basis. Also prior to that time, pursuant to notices served in accordance with Section 6 of the Railway Labor Act (45 U.S.C., § 156) negotiations were entered into between the B&O and the Association of General Chairmen of the four B&O unions which later merged into the UTU and also between Western and the Association of General Chairmen of the Western unions which later merged into UTU, whereby some of the unions sought to change the existing practice of semi-monthly wage payments so that all employees would be paid on Friday of each week.

While negotiations on the union proposals for a change to a weekly pay system were in progress pursuant to Section 6 of the Railway Labor Act, the railroads and their respective associations reached agreement effective August, 1959 on the B&O and April 16, 1960 on the Western, providing for bi-weekly pay for all employees represented by the predecessors of the UTU. Bi-weekly pay has subsequently remained appellants' customary pay practice as to all members of the UTU employed by appellants within the Commonwealth of Pennsylvania.

On or about April 11, 1972, UTU filed a complaint against the B&O before the Pennsylvania Department of Labor and Industry requesting that proceedings be instituted to compel the B&O to pay its employees represented by the UTU on a weekly basis in accordance with the requirements of Pennsylvania Act No. 43 of 1971. On or about October 18, 1972, the UTU filed a similar complaint before the Department against Western. The matter was heard on complaint and answer before Charles Solit, General Counsel and Hearing Examiner, Pennsylvania Department of Labor and Industry, on January 15, 1973.

Thereafter, on April 5, 1973, the Hearing Examiner issued an Order approved by the Secretary of Labor and Industry directing the B&O to comply as soon as practicable and, in any event, no later than sixty (60) days from the date of said Order, with Act No. 43 and to pay those employees covered by the Collective Bargaining Agreements of the former BLF&E and the former Order of Railway Conductors in accordance with said Act. Said Order further directed Western to institute compliance with said Act and to pay as soon as practicable, and no later than sixty (60) days from the date thereof, those employees covered by the Collective Bargaining Agreement of the former Brotherhood of Railroad Trainmen in accordance with said Act.

On Appeal to the Commonwealth Court of Pennsylvania from the Order of the Department of Labor and Industry, the railroads argued that Pennsylvania Act No. 43 of 1971 is unconstitutional under the Supremacy Clause of the United States Constitution, the Commerce Clause

acting in conjunction with the Supremacy Clause and the Fourteenth Amendment of the United States Constitution and also under Article 3, § 32 of the Pennsylvania Constitution, proscribing local and special laws regulating labor. The Commonwealth Court sustained the appeal based upon the Supremacy and Commerce Clauses of the United States Constitution and set aside the Order of the Pennsylvania Department of Labor & Industry. On further apeal, the Supreme Court of Pennsylvania reversed, finding neither a direct conflict between the Federal Railway Labor Act and Pennsylvania Act No. 43 of 1971, nor a general preemption of the subject matter of Pennsylvania Act No. 43 by the Railway Labor Act. The Supreme Court of Pennsylvania agreed with the Commonwealth Court that Pennsylvania Act No. 43 did not deprive appellants of the equal protection of the laws in violation of the United States Constitution or constitute a special or local law regulating labor in violation of the Constitution of the Commonwealth of Pennsylvania. Justice Pomeroy filed a dissenting opinion in which he was joined by Chief Justice Jones, agreeing with appellants herein that State regulation of the pay periods of employees of interstate rail carriers had been preempted by the Railway Labor Act.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL.

As construed by Pennsylvania's highest court, Pennsylvania Act No. 43 of 1971 permits the state legislature to intervene in and terminate the collective bargaining process between interstate railroads and their Pennsylvania employees and to change existing working conditions without the notice and bargaining requirements of the federal Railway Labor Act. This interference with and intrusion upon federal statutory requirements raises

serious and substantial questions under the Supremacy and Commerce Clauses of the Constitution of the United States.

I.

It is beyond cavil that a state law which directly conflicts with federal legislation is rendered invalid under the Supremacy Clause of the United States Constitution, Article VI, Clause 2. *Hines v. Davidowitz,* 312 U.S. 52 (1941). Deciding whether a state statute directly conflicts with a federal statute and is therefore invalid, is "essentially a two step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict." *Perez v. Campbell,* 402 U.S. 637, 644 (1971).

The Railway Labor Act prescribes specific procedures which require collective bargaining concerning proposed changes in agreements affecting "working conditions" which, concededly, include pay periods. Section 6 of the Act (45 U.S.C. § 156) provides that:

> "Sec. 6 [Notice of intended change in agreements affecting rates of pay, rules, or working conditions.] Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been re-

> quested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

The provisions of the Railway Labor Act impose upon the employer and its employees an obligation "to maintain the status quo while the 'purposely long and drawn out' procedures of the Act are exhausted," and apply to the "actual, objective working conditions . . ." in effect prior to the time the dispute arose and which are involved in or related to that dispute whether embodied in a written agreement or not. *Detroit & Toledo Shoreline Railroad Company v. United Transportation Union,* 396 U.S. 142, 143 (1969).

At the time Pennsylvania Act No. 43 was enacted, there was an existing dispute between appellants and the UTU over UTU's request that the B&O and Western adopt weekly pay periods. Consequently, Act No. 43, as now construed by the State's highest court, alters the status quo which federal law requires the parties to maintain and terminates collective bargaining upon a subject on which the parties are federally required to bargain. The Supreme Court of Pennsylvania has nevertheless held there is no conflict between the Railway Labor Act and Pennsylvania Act No. 43 of 1971 because intervention by the State avoids alteration of the status quo by the "parties", thereby relieving employer and employee of any possible conflicting obligations under state and federal law. It is respectfully submitted that relieving the parties of conflicting obligations, if Act No. 43 does so, does not

eliminate the fundamental conflict between the two statutes—that federal law requires both bargaining and the maintenance of the status quo pending changes in working conditions, while Pennsylvania Law abolishes both.

The Pennsylvania Supreme Court concluded that state intervention was distinguishable from the strike inducing "self-help" by the parties which the status-quo provisions of the Railway Labor Act were designed to eliminate and that the Act's primary purpose of preventing strikes therefore did not conflict with Act 43. The Pennsylvania Supreme Court thus ignored the caveat of *Perez v. Campbell, supra,* that the existence of conflict depends upon the effects of the statutes in question and cannot necessarily be determined solely by considerations of "purpose." As this Court recently stated in *Amalgamated Assoc. of Street R.W. Employees v. Lockridge,* 403 U.S. 274, 287, 288 (1971).

> "Conflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy. . . . in matters of dispute concerning labor relations a simple recitation of the formally prescribed rights and duties of the parties constitutes an inadequate description of the actual process for settlement Congress has provided . . . .

Thus, as observed by Judge Rogers in the opinion of the majority of the Commonwealth Court of Pennsylvania in this case (A32):

> "Although the Act of 1971 is expressly subject to the provisions of existing labor agreements, it can and in this case does change a customary working condition contrary to Section 6 of The Railway Labor Act as interpreted by *Detroit & Toledo Shoreline Railway Company v. United Transportation Union,* supra. It substitutes for customary conditions, until

an agreement is reached, the heavy and immediate hand of state law for the collective bargaining process which Congress has declared to be the best and only means of changing such conditions. If we should hold that Pennsylvania may regulate customary pay periods without the agreement of the parties required by The Railway Labor Act, the state could similarly effect (and except for our supersedeas would have here effected) changes in existing practices so drastic as to render subsequent bargaining thereon pointless. Or, state regulations, could be instituted during bargaining, arbitration or mediation under The Federal Railway Labor Act so favorable to one of the parties as to render it impossible realistically for the representatives of that party to relinquish the advantage so conferred at the bargaining table although the other party is prepared for a work stoppage unless a change is made."

A majority of the Supreme Court of Pennsylvania were consoled that Act 43 "defers to any 'applicable labor agreement', so that it can never be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain." However, as Judge Rogers observed in the Commonwealth Court, the Act's deference to the provisions of existing labor agreements is more of form than of substance (A33).

> "The Act of 1971, P.L. 221 is artful in its expressed subservience to hiring contracts and labor agreements and we would have more difficulty finding interference with Federal requirements had the Act expressly exempted customary practices or had the Secretary construed the Act as intending the exemption of customary practices. We do not quarrel with the Secretary's construction, for if the Act is not intended to act on customary pay periods different from the weekly requirement it stipulates, there is nothing for it to act upon, unless there is somewhere in Pennsylvania a railroad enterprise with no labor agreement. The result is that the appellants have been ordered instantly to change a working condition other than by the procedures of The Railway Labor Act."

The decision of the Pennsylvania Supreme Court thus stands squarely opposed to this Court's holding in *California v. Taylor*, 353 U.S. 553 (1957), that a state statute denying collective bargaining rights to employees of a state owned railroad was superseded by the Railway Labor Act.

II.

Just as a state law may be invalid because it directly conflicts with federal legislation, it is equally clear that state regulation must yield in any field in which a federal enactment has undertaken exclusive regulation. *Hines v. Davidowitz, supra.* "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field. . . ." *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, at 142 (1963).

The Pennsylvania Supreme Court correctly recognized that "because the Railway Labor Act is clearly a comprehensive scheme of regulation, exclusive within its own province, it is crucial to ascertain the boundaries of that province." However, the Court then proceeded in

error to equate the issue before it with the very different question whether state safety and health regulation may coexist with the Railway Labor Act. As noted by Justice Pomeroy in the Dissenting Opinion in the Supreme Court of Pennsylvania (n. 9 A22-23):

> "The reliance of the majority opinion, ante, page 10, on *Terminal Railroad Association v. Brotherhood of Railroad Trainmen, supra,* is misplaced. The Supreme Court there distinguished between 'differences that threaten continuity of work' and those which involve 'conditions that threaten the health or safety of workers.' *Id.,* at 6, 87 L. Ed. at 577. The clear implication is that disputes which do not involve health or safety must be resolved through the processes of the Railway Labor Act. This reading of Terminal Railroad Association is borne out by the reference to that case in *California v. Taylor, supra,* at 560, n.8, 1 L. Ed. 2d at 1039, n.8. After citing cases upholding the supremacy of federal statutes relating to railroads in interstate commerce, the Court cites Terminal Railroad Association for the proposition that 'the Railway Labor Act did not preclude a State from establishing minimum health and safety regulations in the interest of railway employees. That case did not concern a conflict between federally protected collective bargaining and inconsistent State laws.' The decision has thus been limited to the facts there involved; the unnecessarily broad language relative to preemption used by Mr. Justice Jackson in his opinion and relied on by the majority here was dictum."

Having erroneously relied upon the *Terminal Railroad* case, the Supreme Court of Pennsylvania failed to consider adequately the exclusive nature of the Railway Labor Act in areas other than safety and health; nor was the majority consistent in its view of the scope of the Act. At one point the majority noted that "the Railway Labor Act is clearly a comprehensive scheme of regulation, exclusive within its own province," yet at another, the Court stated "there is here no pervasive regulation of the field." In this regard, Justice Pomeroy's dissent bears quoting at length (A19-A21):

> "The large field in which this case lies is that of interstate railroad transportation. The pervasiveness of the Congressional interest in and regulation of railroads need not be elaborated upon. (Footnote omitted) 'National rather than local control of interstate railroad transportation has long been the policy of Congress.' *Chicago v. Atchinson, Topeka and Sante Fe Railway Co.,* 357 U.S. 77, 87, 2 L. Ed. 2d 1174 (1958). Turning specifically to the labor aspect of interstate railroad transportation, the relevant federal law is, of course, the Railway Labor Act. Adopted in 1926 that Act is 'essentially an instrument of industry-wide' government. . . . Like the Safety Appliance Act, the Railway Labor Act is 'all-embracing in scope and national in its purpose, which is as capable of being obstructed by a State as by individual action. *United States v. California,* 297 U.S. 175, 186, 80 L. Ed. 567, 573.' *California v. Taylor,* 353 U.S. 553, 565-566, 1 L. Ed. 2d 1034, 1042 (1957). Its purpose is 'to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce. . . .' *The Detroit and Toledo Shoreline Railroad Company v. United Transportation Union,* 396 U.S. 142, 148, 24 L. Ed. 2d 325, 331 (1969). . . . There can be no doubt that a state-

imposed working condition removes that condition from the scope of collective bargaining, which, as above stated, is central to the federal scheme. The bargaining freedom of at least one of the parties is thereby necessarily restricted. Adoption by states of statutes imposing such conditions also inevitably change the status quo, which under the Act is to be maintained while bargaining, and the other steps in the federal machinery, is carried out."

In *United Airlines, Inc. v. Industrial Welfare Commission,* 28 Cal. Reporter 238 (1963) it was held that the Railway Labor Act had preempted state regulation of the working conditions of airline employees in a case involving a state regulation prohibiting employee contributions to the cost of uniforms where, by labor contract, the employees were required to share the cost of uniforms with the employer. Significantly, the Pennsylvania Supreme Court distinguished *United* from the instant case on the ground that the state law there conflicted with a substantive provision of the applicable labor agreement while the conflict in the instant case involves a customary working condition not embodied in the written labor contracts between the parties. This purported basis for distinction only heightens the conflict between Pennsylvania Act No. 43 and the Railway Labor Act in view of this Court's decision in *Detroit and Toledo Shoreline Railroad Company v. United Transportation Union, supra,* holding there is no difference under Section 6 of the Railway Labor Act between working conditions provided for by contract and those actual unwritten working conditions which exist by custom. Pennsylvania Act 43 thus cannot be enforced without impairing the superintendence of the Railway Labor Act in the field of regulating the manner of changing working conditions on interstate Railroads.

CONCLUSION.

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

NORMAN R. BRADLEY,
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Of Counsel:
SAUL, EWING, REMICK
& SAUL.

Appendix.

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT.

No. 165 March T. 1974

No. 562 ALLOCATUR DOCKET.

BALTIMORE AND OHIO RAILROAD CO. AND
WESTERN MARYLAND RAILWAY COMPANY,
Appellants,

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY,
Appellee,

AND

UNITED TRANSPORTATION UNION,
Intervening Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Notice is hereby given that the Baltimore and Ohio Railroad Co. and Western Maryland Railway Company hereby appeal to the Supreme Court of the United States from the final Order of the Supreme Court of Pennsylvania entered in this action on March 18, 1975, reversing an Order of the Commonwealth Court of Pennsylvania dated February 11, 1974.

This appeal is taken pursuant to 28 U. S. C. § 1257(2).

/s/ NORMAN R. BRADLEY,
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Filed: June 6, 1975.

CERTIFICATE OF SERVICE.

I hereby certify I have this date served the attached Notice of Appeal upon all parties of record, by mailing a copy thereof, properly addressed with first-class postage prepaid.

/s/ NORMAN R. BRADLEY,
Norman R. Bradley,
Attorney for Appellants,
Baltimore & Ohio Railroad Co. and Western Maryland Railway Company.

June 4, 1975.

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT.

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No. 165 MARCH TERM, 1974.

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BALTIMORE & OHIO RAILROAD CO., AND
WESTERN MARYLAND RAILWAY COMPANY,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF LABOR AND INDUSTRY, AND UNITED TRANSPORTATION UNION,

Appellants.

—

APPEAL FROM ORDER OF COMMONWEALTH COURT OF PENNSYLVANIA OF FEBRUARY 11, 1974
AT No. 625 C.D. 1973.

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OPINION OF THE COURT.

ROBERTS, *J.* FILED: MARCH 18, 1975.

As a result of an administrative proceeding commenced by appellant United Transportation Union, appellee railroads were directed to adopt weekly pay periods for certain of their employees, as required by Pennsylvania Act No. 43 of 1971.[1] The railroads appealed this order to the Commonwealth Court, urging that the

1. "Unless otherwise stipulated in the contract of hiring or in the applicable labor agreement, every common carrier by railroad or corporation or joint stock association, operating a steam, electric, or diesel surface railroad, or engaged in the sleeping car business, or carrying on the business thereof by lease or otherwise, shall pay once each week to each employee, the wages earned for the seven day period ending not more than fourteen days prior to such payment. Wages as the term is herein used shall be limited to those derived from basic pro rata rates of pay pursuant to labor agreement, and shall not include incentives, bonuses, and other similar types of fringe payments."
Act of July 14, 1971, P.L. 221, No. 43, 43 P.S. § 255.1 (Supp. 1974).

Act was invalid under the Supremacy Clause of the United States Constitution because it conflicted with the federal Railway Labor Act[2] and because it invaded a field totally occupied and therefore preempted by the Railway Labor Act.[3] They also argued that Act No. 43 discriminated against railroads without any rational basis for distinction from other businesses, in violation of the Equal Protection Clause of the Fourteenth Amendment and article III, section 32 of the Pennsylvania Constitution. The Commonwealth Court, two judges dissenting, held that Act No. 43 conflicted with the Railway Labor Act and was therefore unconstitutional.[4] We granted leave to appeal in order to consider the important questions involved.[5] We reverse.

Prior to 1971, Pennsylvania law required railroads to pay their employees not less often than semi-monthly,[6] and appellees utilized bi-weekly pay periods. Despite the

2. 45 U.S.C. § 151 et seq. (1970).

3. Reference was also made to the Commerce Clause, but this was clearly intended only as the source of the power exercised by Congress in enacting the Railway Labor Act. No argument is made that, absent the Railway Labor Act, the Pennsylvania statute would impose an undue burden upon interstate commerce.

4. *Baltimore & O. R.R. v. Commonwealth*, 12 Pa. Commonwealth Ct. 292, 314 A.2d 862 (1974).

5. Appellate Court Jurisdiction Act of 1970, Act of July 31, 1970, P.L. 678, art. II, § 204(a), 17 P.S. § 211.204(a) (Supp. 1974).

6. As in the present statute, this requirement was inapplicable if the timing of wage payments is "otherwise stipulated in the contract of hiring or in the applicable labor agreement." Act of April 24, 1913, P.L. 114, § 1 (repealed 1971). See also note 1 supra.

passage of Act No. 43, appellees continued to utilize bi-weekly pay periods [7] and appellant union filed administrative complaints with the Department of Labor and Industry, contending that, as to certain of appellees' employees, this practice was in violation of the Act. The Department held an administrative hearing and found that some of appellees' employees were covered by no "contract of hiring or . . . applicable labor agreement" providing for other than weekly payment of wages.[8] Appellees were ordered to pay "those employees . . . in accordance with [the] Act." The appeal to the Commonwealth Court ensued.

Appellees' principal contention, and the basis of the Commonwealth Court's decision, is federal preemption. Clearly, state law which directly conflicts with federal legislation is invalid under the Supremacy Clause. *Perez v. Campbell*, 402 U.S. 637, 91 S. Ct. 1704 (1971). Furthermore, even if there is no direct conflict, the state law may be invalid if it infringes where Congress has undertaken such comprehensive regulation as to evidence an intent to exclude all state legislation. *Pennsylvania v. Nelson*, 350 U.S. 497, 76 S. Ct. 477 (1956) (federal statute preempts state statute prohibiting sedition); *Hines v. Davidowitz*, 312 U.S. 52, 61 S. Ct. 399 (1941) (federal alien registration statute occupies the field and precludes operation of state laws on same subject); *Bessemer & L.E.R.R. v. Pennsylvania Public Utilities Commission*, 430 Pa. 339, 243 A.2d 358, cert. denied, 393 U.S. 959, 89 S. Ct. 395 (1968) (federal regulation of railroad safety preempts state regulation requiring particular methods of

7. The union represents in its brief that all other railroads in the Commonwealth voluntarily complied with Act. No. 43.

8. This finding is not contested on appeal. The employees in question are covered by a collective bargaining agreement, but it does not deal with frequency of payment.

preventing rear-end collisions). Appellees contend that Act No. 43 is defective in both respects.

The method for resolving the question of conflict is shown by *Perez v. Campbell*, supra:

> "Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict."

Id. at 644, 91 S. Ct. at 1708.

The first step of this process presents no difficulty. The objectives and operation of the Railway Labor Act were summarized in *Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 63 S. Ct. 420 (1943), itself a preemption case:

> "The purpose of this Act is declared to be to provide 'for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions'; and 'for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.' It places upon carriers and employees the duty of exerting every reasonable effort to settle these disputes by agreement, and prohibits the carrier from altering agreed rates of pay, rules or working conditions except in the manner provided by the agreement or by the Act itself. Machinery is set up for the adjustment, mediation, and arbitration of disputes which the parties do not succeed in settling among themselves."

Id. at 5, 63 S. Ct. at 422 (footnotes omitted).

The purpose of Act No. 43 is apparent on its face. It seeks to insure prompt payment of the wages earned by railroad employees where no provision on the timing of payment is included in an applicable collective bargaining agreement or "contract of hire."

Passing to the second step of the conflict analysis, the test to be applied is clear. Act No. 43 is invalid if it stands "as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404 (1941); *Perez v. Campbell*, 402 U.S. 637, 649, 91 S. Ct. 1704, 1711 (1971).

Clearly there is here no conflict between the purposes of the respective statutes. Compare *Perez v. Campbell*, supra; [9] *California v. Taylor*, 353 U.S. 553, 77 S. Ct. 1037 (1957) (state law purporting to forbid collective bargaining by employees of publicly owned railroad engaged in interstate commerce held invalid). Further, Act No. 43 expressly defers to any "applicable labor agreement," so it can never "be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain." *Local 24, Teamsters v. Oliver*, 358 U.S. 283, 295, 79 S. Ct. 297, 304 (1959); see *California v. Taylor*, supra, at 561, 77 S. Ct. at 1042 (dictum); *Railway Employees Department v. Hanson*, 351 U.S. 225, 232, 76 S. Ct. 714, 718 (1956) (dictum).

The manner in which appellees construct the purported conflict is more complex. The Railway Labor Act "imposes an obligation upon the parties to a railroad labor dispute to maintain the status quo while the 'purposely long and drawn out' procedures of the Act are exhausted."

9. "[A] state statute that protects judgment creditors from 'financially irresponsible persons' is in conflict with a federal statute that gives discharged debtors a new start 'unhampered by the pressure and discouragement of preexisting debt.'" *Perez v. Campbell*, 402 U.S. 637, 649, 91 S. Ct. 1704, 1711 (1971).

Detroit & T.S.L. R.R. v. United Transportation Union, 396 U.S. 142, 143, 90 S. Ct. 294, 295 (1969) (footnote omitted). This not only requires compliance with any collective bargaining agreement between the parties, but the preservation of the "actual objective working conditions . . . which were in effect prior to the time the dispute arose and which are involved in or related to that dispute." Id. at 153, 90 S. Ct. at 301 (footnote omitted). At the time Act No. 43 was enacted, there was an existing dispute between appellees and the union over the union's request to adopt weekly pay periods. Consequently, appellees argue, Act No. 43 commands them to alter the status quo which they are compelled by federal law to maintain.

While plausible, this argument cannot withstand analysis. To begin with, appellees are not subject to conflicting legal obligation (to maintain and to change the status quo). Appellees would not violate the Railway Labor Act by complying with Act No. 43 because that compliance is precisely what the union seeks.

Moreover, appellees' interpretation bears little relation to "the Act's primary objective—the prevention of strikes." Id. at 154, 90 S. Ct. at 301. The Railway Labor Act does not prohibit changes in the status quo as such, but only unilateral changes by one of the parties, which would provoke retaliation by the other. As the Supreme Court said in *Detroit & T.S.L.R.R. v. United Transportation Union*, supra:

> "If the railroad is free to take advantage of the agreement's silence and resort to self-help, the union cannot be expected to hold back its own economic weapons, including the strike. Only if both sides are equally restrained can the Act's remedies work effectively."

Id. at 155, 90 S. Ct. at 302 (footnote omitted).

This danger is not present where, as here, the change is mandated by state law rather than adopted unilaterally by one of the parties. There is no provocative exercise of self-help, and before any resort is made to self-help, the procedures of the Act must be exhausted. Consequently, we conclude that there is no direct conflict between Act No. 43 and the Railway Labor Act.

The question remains whether the Railway Labor Act has undertaken such a comprehensive regulation of the field of railway labor as to evidence an intent to exclude all state legislation, without regard to conflict. See *Pennsylvania v. Nelson,* 350 U.S. 497, 76 S. Ct. 477 (1956); *Hines v. Davidowitz,* 312 U.S. 52, 61 S. Ct. 399 (1941); *Bessemer & L.E.R.R. v. Pennsylvania Public Utilities Commission,* 430 Pa. 339, 243 A.2d 358, cert. denied, 393 U.S. 959, 89 S. Ct. 395 (1968). "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field . . . ." *Florida Lime & Avocado Growers v. Paul,* 373 U.S. 132, 142, 83 S. Ct. 1210, 1217 (1963).

Because the Railway Labor Act is clearly a comprehensive scheme of regulation, exclusive within its own province, it is crucial to ascertain the boundaries of that province. The Supreme Court has delineated the field covered by the Railway Labor Act in many cases involving preemption questions.

> " '[T]he Railway Labor Act ° ° ° does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest . . . is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce.' "

Brotherhood of Locomotive Engineers v. Baltimore & O.R.R., 372 U.S. 284, 289-90, 83 S. Ct. 691, 694 (1963).

The principle that the Railway Labor Act does not preclude a state from regulating the working conditions of railway employees was established in the first case to consider the preemptive effect of that Act, *Terminal Railroad Association v. Brotherhood of Railroad Trainmen,* 318 U.S. 1, 63 S. Ct. 420 (1943). That case involved a state requirement that a railroad equip its trains with cabooses on designated routes. That requirement, like this one, was the subject of a preexisting dispute between the railroad and its employees, the existing contract calling for cabooses on some trains, but not those subject to the state order. The Court nonetheless rejected the contention that the Railway Labor Act precluded the operation of the state regulation.

Justice Jackson, writing for a unanimous Court, first observed that the procedures of the Railway Labor Act operate "to compose differences that threaten continuity of work, not to remove conditions that threaten the health or safety of workers." Id. at 6, 63 S. Ct. at 423. He continued:

> "State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and

> protection, and innumerable others. Any of these matters might, we suppose, be the subject of a demand by workmen for better protection and upon refusal might be the subject of a labor dispute which would have such effect on interstate commerce that federal agencies might be invoked to deal with some phase of it. But we would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation. . . . We hold that the enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves and did not preclude the State of Illinois from making the order in question."

Id. at 6-7, 63 S. Ct. at 423.

Appellees urge, however, that the power of the state to regulate working conditions is limited to matters of health and safety. In support of this proposition they cite *United Air Lines, Inc. v. Industrial Welfare Commission*, 211 Cal. App. 2d 729, 28 Cal. Rptr. 238 (1963). That case involved a state regulation prohibiting an employer in the transportation industry from requiring an employee to contribute to the cost of purchase or maintenance of uniforms. The airline challenged the power of the state to apply this regulation to two classes of its employees: stewardesses and ticket agents. The stewardesses were covered by a collective bargaining agreement providing for a division of the cost of uniforms between employer and employee. The ticket agents were not covered by any collective bargaining agreement. As to the ticket agents, the court summarily rejected the preemption

argument, holding that "the inhibitions of the Railway Labor Act apply only where there is such an agreement." *Id.* at –, 28 Cal. Rptr. at 249.

The key to the analysis which led the *United Air Lines* court to conclude that the state law was preempted as it applied to stewardesses was *Local 24, Teamsters v. Oliver*, 358 U.S. 283, 79 S. Ct. 297 (1959). In that case, the Supreme Court held that Ohio antitrust law could not preclude the operation of a collective bargaining agreement providing for minimum rentals on owner-operated trucks. The basis for this holding was the conclusion that, in the type of case before the Court, state law could not "be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain." Id. at 295, 79 S. Ct. at 304. The Court then limited its holding by noting, "We have not here a case of a collective bargaining agreement in conflict with a local health or safety regulation. . . ." Id. at 297, 79 S. Ct. at 305.

Carefully read, the *United Air Lines* case is nothing more than a simple application of *Oliver*. A collective bargaining agreement existed and conflicted with the state regulation. Since the state regulation involved neither health nor safety, it could not prevail over a collective bargaining agreement having "the imprimatur of federal law." *Railway Employees' Department v. Hanson*, 351 U.S. 225, 232, 76 S. Ct. 714, 718 (1956). *United Air Lines* is therefore inapposite to this case, for there is and can be no conflict between Act No. 43 and any "applicable labor agreement."

There is no support in the decisions of the Supreme Court for appellees' contention that, even in the absence of conflict with a collective bargaining agreement, the states are precluded from non-health related regulation of

the working conditions of railroad employees. Indeed, the contrary result follows from the general principles outlined above, particularly in the light of the Supreme Court's admonition that,

> "[T]he principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusions, or that the Congress has unmistakably so ordained."

Florida Lime & Avocado Growers v. Paul, 372 U.S. 132, 142, 83 S. Ct. 1210, 1217 (1963).

As the Supreme Court has noted, the purpose of the Railway Labor Act is "to compose differences that threaten continuity of work, not to remove conditions that threaten the health or safety of workers." *Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, supra, at 6, 63 S. Ct. at 423. While the issue was not then before the Court, the reasoning applies equally well to threats to employee welfare not directly involving health or safety.

Thus, there is here no pervasive regulation of the field in which Act No. 43 operates, such as this Court found in *Bessemer & L.E.R.R. v. Pennsylvania Public Utilities Commission*, 430 Pa. 339, 243 A.2d 358, cert. denied, 393 U.S. 959, 89 S. Ct. 395 (1968) (railroad safety). Neither does Act No. 43 "'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject.'" *Pennsylvania v. Nelson*, 350 U.S. 497, 504, 76 S. Ct. 477, 481 (1956) (sedition against federal government); see *Hines v. Davidowitz*, 312 U.S. 52, 62-68, 61 S. Ct. 399, 401-05 (1941) (alien registration). Finally, there

is no unmistakable Congressional command to exclude state regulation of labor conditions affecting railroad employees. Consequently, we conclude that Act No. 43 is not preempted. See *Florida Lime & Avocado Growers v. Paul*, supra.

While we have rejected the preemption reasoning on which the Commonwealth Court rested its holding, we must also consider appellee's contentions under the Equal Protection Clause of the federal Constitution and article III, section 32 of the Pennsylvania Constitution.[10] These issues may be considered together, for the content of the two provisions is not significantly different. *Bargain City U.S.A. v. Dilworth*, 407 Pa. 129, 131-33, 179 A.2d 439, 441-42 (1962); compare *Milk Control Commission v. Battista*, 413 Pa. 652, 198 A.2d 840, appeal dismissed, 379 U.S. 3, 85 S. Ct. 75 (1964), with *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 75 S. Ct. 461 (1955); see also, *Tosto v. Pennsylvania Nursing Home Loan Agency*, – Pa. –, –, – A.2d –, – (1975).

Neither the Equal Protection Clause nor article III, section 32's prohibition of special laws forbids the state to draw distinctions. Rather, both require only that the distinctions drawn have some rational relation to a proper state purpose.[11] *Tosto v. Pennsylvania Nursing Home*

10. It is well settled that, even though an order is based on erroneous reasoning, this Court may affirm if the result is correct for any reason. *Estate of Prynn*, 455 Pa. 192, 197 n.9, 315 A.2d 265, 267 n.9 (1973); *Concord Township Appeal*, 439 Pa. 466, 469, 268 A.2d 765, 766 (1970); *Ridley Township v. Pronesti*, 431 Pa. 34, 37, 244 A.2d 719, 720-21 (1968); *Taylor v. Churchill V.C.C.*, 425 Pa. 266, 228 A.2d 768 (1967); *Sherwood v. Elgart*, 383 Pa. 110, 117 A.2d 899 (1955).

11. The test is more stringent if the basis of the classification is "suspect" or if it infringes upon a "fundamental right." See generally *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17-44, 93 S. Ct. 1278, 1288-1302 (1973). No claim is made that either a "suspect classification" or a "fundamental right" is involved in this case.

Loan Agency, supra; *Johnson v. Pennsylvania Housing Finance Agency,* 453 Pa. 324, 347, 309 A.2d 528, 538 (1973); *Williamson v. Lee Optical, Inc.,* supra; *Eisenstadt v. Baird,* 405 U.S. 438, 92 S. Ct. 1029 (1972).

Appellees urge most forcefully that there is no basis for singling out railroads from the class of common carriers as the subject of this regulation. But the Legislature may have found differences in the structure of the business or labor relations environment between the railroad industry and other common carriers. In particular it might have found differences in the normal pattern of employment-related travel creating an unusual need for prompt payment of railroad workers. Alternatively, it might have concluded that in other branches of industry, either weekly payment or agreements for less frequent payment were so widespread that the statute would have no effect. Yet again it might have noted the current financial instability of railroads and concluded that this statute was necessary to minimize the exposure of railroad employees to loss in the event of the insolvency of their employer. Any of these conclusions would furnish a rational basis for Act No. 43. See *McGowan v. Maryland,* 366 U.S. 420, 426, 81 S. Ct. 1101, 1105 (1961); *Williamson v. Lee Optical, Inc.,* 348 U.S. 483, 489, 75 S. Ct. 461, 465 (1955); Note, Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1085 (1969).

We conclude that Act No. 43 neither denies appellees the equal protection of the laws nor is a special law prohibited by article III, section 32 of the Pennsylvania Constitution.

Order of the Commonwealth Court setting aside the order of the Secretary of Labor and Industry reversed.

Mr. Justice Pomeroy filed a dissenting opinion in which Mr. Chief Justice Jones joins.

DISSENTING OPINION.

Pomeroy, *J.*, Filed: March 18, 1975.

With respect, I am unable to agree with the Court that the subject matter of Act No. 43 [1] has not been preempted by the federal Railway Labor Act.[2] In my opinion, the federal government has occupied the field covered by the Pennsylvania statute, and the latter must, under the Supremacy Clause,[3] give way.

There is no disagreement as to the general principles involved. As Mr. Justice Roberts said, in speaking for this Court in *Bessemer & L.E.R. Co. v. Pennsylvania Public Utility Commission,* 430 Pa. 339, 243 A.2d 358 (1968) *cert. denied,* 393 U.S. 959, 21 L. Ed. 2d 373 (1968), *reh. denied,* 393 U.S. 1045, 21 L. Ed. 276 (1969):

> "It is certainly too late in the development of constitutional law to say that Congress may not preempt an entire field by the passage of a broad based statute, even though the regulations passed pursuant to that statute do not in fact cover every possible situation. Moreover, once such a statute is passed, and the intention to preempt state law in the area becomes manifest, the various states may not pass legislation *even supplemental to the federal rules,* so long as the area affected by these supplemental acts coincides with the federal bailiwick." (Emphasis added.) 430 Pa. at 346.

The Court spoke in similar vein through Mr. Justice Cohen in *Mamula v. United Steelworkers,* 409 Pa. 175, 185 A.2d 595 (1962):

1. Act of July 14, 1971, P.L. 221, 43 P.S. § 255.1 (Supp. 1974).

2. Act of May 20, 1926, Ch. 347, § 1, 44 Stat. 577, as amended, 45 U.S.C. § 151 et seq. (1971).

3. Constitution of the United States, Art. 6 clause 2.

> "Where the Congress of the United States enacts a comprehensive statute which is intended to occupy the field, the Supremacy Clause of the United States Constitution requires that the state legislature and judiciary defer to the superior command of Congress. This doctrine is particularly applicable in the area of labor law which is covered in detail by numerous comprehensive federal statutes." 409 Pa. at 178.

The problem, of course, is to determine whether a particular Congressional enactment has occupied a particular field so completely as to indicate a clear intention to preclude state regulation. See *City of Chicago v. Atchison Topeka and Sante Fe Railway Co.*, 357 U.S. 77, 2 L. Ed. 2d 1174 (1958). Recognizing the perplexities that inhere in making such a determination, I am nevertheless unable to subscribe to the Court's holding that Congress has left the states free to legislate in the area of rates of pay, rules and working conditions of employees of railroads involved in interstate commerce. Under today's decision, the legislature of any state could by statute or authorized regulation prescribe a work condition for railway labor, provided only that the subject matter of the condition was not already a matter of agreement between a railroad and its employees. This cannot have been the intent of the Congress.

Guides to Congressional intent to preempt an area previously occupied by the states include the pervasiveness of the scheme of federal regulation, the dominance of the federal interest in the field, and possible inconsistency of the state policy with the objective of the federal statute.[4] All three criteria point to preemption in the present case.

4. The Supreme Court's statement of these indicia of congressional intent was as follows:

> "The scheme of federal regulation may be *so pervasive* as to make reasonable the inference that Congress left no room for

The large field in which this case lies is that of interstate railroad transportation. The pervasiveness of the Congressional interest in and regulation of railroads need not be elaborated upon.[5] "National rather than local control of interstate railroad transportation has long been the policy of Congress." *Chicago v. Atchison Topeka & Santa Fe Railway Co.*, 357 U.S. 77, 87, 2 L. Ed. 2d 1174 (1958). Turning specifically to the labor aspect of interstate railroad transportation, the relevant federal law is, of course, the Railway Labor Act. Adopted in 1926, that Act is "essentially an instrument of industry-wide government. . . . Like the Safety Appliance Act, the Railway Labor Act is 'all-embracing in scope and national in its purpose, which is as capable of being obstructed by a State as by individual action. United States v. California, 297 U.S. 175, 186, 80 L. Ed. 567, 573.'" *California v. Taylor*, 353 U.S. 553, 565-566, 1 L. Ed. 2d 1034, 1042 (1957). Its purpose is "to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce. . . ." *The Detroit & Toledo Shore Line Railroad Company v. United Transportation Union*, 396 U.S. 142, 148, 24 L. Ed. 2d 325, 331 (1969). "To this end, the Act

4. (Cont'd.)

> the States to supplement it. [citations omitted]. Of the Act of Congress may touch a field in which the federal interest is *so dominant* that the federal system will be assumed to preclude enforcement of state laws on the same subject. [citation omitted]. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. [citations omitted]. Or *the state policy may produce a result inconsistent with the objective of the federal statute.*" *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 1459 (1947). (Emphasis added).

5. See generally Title 45 of the United States Code and the many statutes embraced therein governing railroads in interstate commerce.

established a rather elaborate machinery for negotiation, mediation, voluntary arbitration, and conciliation . . . . It imposed upon the parties an obligation to make every reasonable effort to negotiate a settlement and to refrain from altering the status quo by resorting to self-help while the Act's remedies were being exhausted . . . . A final and crucial aspect of the Act was the power given to the parties and to representatives of the public to make the exhaustion of the Act's remedies an almost interminable process. As we noted in *Railway Clerks v. Florida E.C.R. Co.*, 384 U.S. 238, 246, 16 L. Ed. 2d 501, 507 (1966), 'The procedures of the Act are purposely long drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute.'" *The Detroit & Toledo Shore Line Railroad Company v. United Transportation Union, supra,* at 148-49, 24 L. Ed. 2d at 332. See also *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 377-380, 22 L. Ed. 2d 344, 354-55 (1969).[6]

Central to the process of dispute resolution created by the Railway Labor Act are collective bargaining relating to rates of pay, rules and working conditions, and maintenance of the status quo during negotiations and thereafter during the stages of mediation mandated by

6. The broad purposes of the Railway Labor Act as set forth by Congress in § 2 of the Act, 45 U.S.C. § 151a are as follows:

"The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees of any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a (1971).

the Act.[7] *Shore Line Railway Co. v. Transportation Union, supra,* 396 U.S. at 150, 24 L. Ed. 2d at 332. There can be no doubt that a state-imposed working condition removes that condition from the scope of collective bargaining, which, as above stated, is central to the federal scheme. The bargaining freedom of at least one of the parties is thereby necessarily restricted. Adoption by states of statutes imposing such conditions also inevitably change the status quo, which under the Act is to be maintained while bargaining, and the other steps in the federal machinery, is carried out.

In *California v. Taylor,* 353 U.S. 553, 1 L. Ed. 2d 1034 (1957) the Supreme Court dealt with the applicability of the Railway Labor Act to a state-owned railroad, the Belt Railroad. Under California law the employees of the Belt Railroad, being state employees, had no right to bargain collectively with the state concerning those terms and conditions of employment which were fixed by the civil service laws of the state. The Supreme Court held that the Rail-

7. Section 6 of the Railway Labor Act, 45 U.S.C. § 156, provides as follows:

"[Notice of Intended Change in Agreements affecting Rates of Pay, Rules, or Working Conditions.] Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipts of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

way Labor Act applied to the Belt Railroad, and that the policy of the state must therefore give way. Crucial to the decision was the purpose and policy of the Railway Labor Act to protect and promote collective bargaining. "[T]he Act's policy of protecting collective bargaining comes into conflict with the rule of California law that state employees have no right to bargain collectively with the state concerning terms and conditions of employment which are fixed by the state's civil service laws. The state civil service relationship is the antithesis of that established by collectively bargained contracts throughout the railroad industry." 353 U.S. at 559, 560, 1 L. Ed. 2d at 1039. Accord, *International Longshoreman's Association v. North Carolina State Ports Authority,* 370 F. Supp. 33 (E.D.N.C. 1974).

There is no question that the length of a pay period is a "working condition" and subject to the provision of Sec. 6 of the Railway Labor Act. Indeed, the record shows that pay periods have been so treated for many years by the parties to this dispute.[8] That working condition—which the legislature of Pennsylvania has by Act No. 43 declared to be non-bargainable—stands in no different light than the working conditions which in California were fixed by that state's civil service laws. The same reasons which impelled the Supreme Court to hold that since the federal Act applied to the Belt Railroad the policy of California must give way, dictate that the policy of Pennsylvania as stated in Act No. 43 must also give way.[9]

8. A change to a weekly pay system was proposed by means of a Section 6 notice by predecessor organizations to United Transportation Union, the present appellant, in 1959. Negotiations pursuant thereto resulted in a change from a semi-monthly basis of payments to a bi-weekly basis. This basis has continued to date.

9. The reliance of the majority opinion, ante, page 10, on *Terminal Railroad Association v. Brotherhood of Railroad Trainmen, supra,* is misplaced. The Supreme Court there distinguished between "differences that threaten continuity of work" and those

The Commonwealth Court, in my view, was entirely sound in its analysis of the issue here involved and in the conclusions it reached. I quote at length the following passage of Judge Rogers' opinion:

> "We have concluded that the Act of 1971, P. L. 221, is an attempt on the part of the state to regulate this working condition in the interest of employes; that it has the effect of changing working conditions without the notice and bargaining requirements of The Railway Labor Act; that it is an interference with and an intrusion upon Federal requirements; and that it offends the Supremacy and Commerce clauses hereinbefore cited. Although the Act of 1971 is expressly subject to the provisions of existing labor agreements, it can and in this case does change a customary working condition contrary to Section 6 of The Railway Labor Act as interpreted by *Detroit & Toledo Shore Line Railway Company v. United Transportation Union,* supra. It substitutes for customary conditions, until an agreement is reached, the heavy and immediate hand of state law for the collective bargaining process which Congress has declared to be the best

9. (Cont'd.)
which involve "conditions that threaten the health or safety of workers." *Id.*, at 6, 87 L. Ed. at 577. The clear implication is that disputes which do not involve health or safety must be resolved through the processes of the Railway Labor Act. This reading of *Terminal Railroad Association* is borne out by the reference to that case in *California v. Taylor, supra* at 560, n.8, 1 L. Ed. 2d at 1039, n.8. After citing cases upholding the supremacy of federal statutes relating to railroads in interstate commerce, the Court cites *Terminal Railroad Association* for the proposition that "the Railway Labor Act did not preclude a State from establishing minimum health and safety regulations in the interest of railway employees. That case did not concern a conflict between federally protected collective bargaining and inconsistent State laws." The decision has thus been limited to the facts there involved; the unnecessarily broad language relative to preemption used by Mr. Justice Jackson in his opinion and relied on by the majority here was dictum.

and only means of changing such conditions. If we should hold that Pennsylvania may regulate customary pay periods without the agreement of the parties required by The Railway Labor Act, the state could similarly effect (and except for our supersedeas would have here effected) changes in existing practices so drastic as to render subsequent bargaining thereon pointless. Or, state regulations, could be instituted during bargaining arbitration or mediation under The Federal Railway Act so favorable to one of the parties as to render it impossible realistically for the representatives of that party to relinquish the advantage so conferred at the bargaining table although the other party is prepared for a work stoppage unless a change is made.

"The Act of 1971, P. L. 221 is artful in its express subservience to hiring contracts and labor agreements and we would have more difficulty finding interference with Federal requirements had the Act expressly exempted customary practices or had the Secretary construed the Act as intending the exemption of customary practices. We do not quarrel with the Secretary's construction, for if the Act is not intended to act on customary pay periods different from the weekly requirement it stipulates, there is nothing for it to act upon, unless there is somewhere in Pennsylvania a railroad enterprise with no labor agreement. The result is that the appellants have been ordered instantly to change a working condition other than by the procedures of The Railway Labor Act. This brings the case clearly within the rulings of *California v. Taylor*, 353 U.S. 553 (1957), holding that a state statute denying state employes collective bargaining rights was superseded as to employes of a

state owned railroad by The Railway Labor Act, and *Local 24, I.B. of T. v. Oliver*, 358 U.S. 283 (1959), holding that a state antitrust law must give way to provisions of a labor agreement reached under the provisions of the National Labor Relations Act."

Baltimore & Ohio R.R. v. Department of Labor & Industry, 12 Pa. Com. Ct. 292, at 298-300, 314 A.2d 862 at 865-66 (1974).

Because I find that the Act of 1971 is invalid under the preemption doctrine, I do not reach the questions of the constitutionality of the Act under the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States and under Article III, Section 32, of the Constitution of Pennsylvania.

I would affirm the order of the Commonwealth Court setting aside the order of the Secretary of the Department of Labor and Industry.

MR. CHIEF JUSTICE JONES joins in this dissent.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

—

No. 625 C.D. 1973

—

BALTIMORE AND OHIO RAILROAD CO. AND WESTERN MARYLAND RAILWAY COMPANY,
Appellants

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY,
Appellee

and

UNITED TRANSPORTATION UNION,
Intervening Appellee

BEFORE:

HONORABLE JAMES C. CRUMLISH, JR., Judge
HONORABLE HARRY A. KRAMER, Judge
HONORABLE ROY WILKINSON, JR., Judge
HONORABLE GLENN E. MENCER, Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge

Argued: December 3, 1973—HARRISBURG

OPINION.

OPINION BY JUDGE ROGERS FILED: February 11, 1974

United Transportation Union, a labor organization which represents the employes of Baltimore & Ohio Railroad Co. and Western Maryland Railway Company, filed with the Department of Labor and Industry of Pennsyl-

vania complaints alleging the failure of those railroad companies to comply with an Act of Assembly requiring such enterprises to pay its employes weekly and requesting the Department to order compliance. The Act in question is that of July 14, 1971, P.L. 221, 43 P.S. § 255.1, which provides:

> "*Unless otherwise stipulated in the contract of hiring or in the applicable labor agreement*, every common carrier by railroad or corporation or joint stock association, operating a steam, electric, or diesel surface railroad, or engaged in the sleeping car business, or carrying on the business thereof by lease or otherwise, *shall pay once each week to each employe*, the wages earned for the seven day period ending not more than fourteen days prior to such payment. Wages as the term is herein used shall be limited to those earnings derived from basic pro rata rates of pay pursuant to a labor agreement, and shall not include incentives, bonuses, and other similar types of fringe payments." (Emphasis supplied.)

The Department appointed an examiner who conducted an evidentiary hearing to determine whether there existed contracts of hiring or labor agreements which would exempt the companies from compliance with the Act and justify the continuance by them of their practice of paying employes biweekly. The examiner found that there were labor agreements authorizing biweekly pay periods covering some but not all of the employes of each of the railroad companies. We recommended, and the Secretary approved and issued, an order that the companies pay those employes not covered by agreements weekly as the Act provides. The railroad companies have appealed.

While the appellants appear still to disagree with the Secretary's conclusion that a customary pay practice not embodied in a written labor agreement is not an applicable labor agreement, the only question they present for our review is that of the constitutionality of the Pennsylvania Act under the Supremacy Clause,[1] the Commerce Clause [2] acting in conjunction with the Supremacy Clause, the Fourteenth Amendment of the United States and Article III, Section 32 of the Pennsylvania Constitution, which last prohibits the General Assembly, *inter alia,* from passing local or special laws regulating labor.

The appellants contend that the Act of 1971, P.L. 211, is at odds wtih The Railway Labor Act, 45 U.S.C.A. § 151 and is therefore unenforceable. The purposes sought to be accomplished by The Railway Labor Act are the avoidance of interruption in railroad service; the protection of freedom of association among railroad employes; the assurance of independence of both railroads and their employes to organize; the provision for prompt and orderly settlement of disputes between railroads and their employes concerning rates of pay, rules or working conditions; and the prompt and orderly settlement of disputes growing out of grievances or the application of agreements concerning rates of pay, rules or working conditions. 45 U.S.C.A. § 151(a). These purposes are sought to be achieved by imposing upon railroads and their employes the duties of conferring and diligently attempting to resolve their disputes amicably and by the provision of detailed procedures and elaborate machinery to assist these efforts. The National Railroad Adjustment Board is created to hear disputes not settled by conference of the parties; the National Mediation Board mediates major disputes and superintends their arbitration; and, where all else has failed, an Emergency Board appointed by the President may investigate and report on the dispute. Strike action and lockouts are postponed or delayed during the considerable time these mandatory statutory procedures are being exhausted and unilateral action to change existing conditions is forbidden without written notice and bargaining, if desired. Section 6, 45 U.S.C.A. § 156 provides:

> "Sec. 6. [Notice of Intended Change in Agreements affecting Rates of Pay, Rules, or Working Conditions.] Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipts of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

The essence of the Federal legislation is that work stoppages on account of labor disputes will be best prevented if the parties themselves establish the rates of

1. Article VI of the United States Constitution.
2. Article I, Section 8 of the United States Constitution.

pay, rules and working conditions in the industry and settle their disputes by negotiation with the assistance of competent Federal agencies, under the influence finally of an informed public opinion. In *Detroit & Toledo Shore Line Railroad Company v. United Transportation Union*, 396 U.S. 142 (1969), the Supreme Court held that the status quo which must be maintained by Section 6 of The Federal Railway Act includes not only matters expressly dealt with in existing collective bargaining agreements but also actual conditions out of which the dispute arose, although not covered in the agreement. Justice Black explained the Act's purpose and methods as follows:

> "The Railway Labor Act was passed in 1926 to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce. The problem of strikes was considered to be particularly acute in the area of 'major disputes,' those disputes involving the formation of collective agreements and efforts to change them. Elgin, J. & E. R. Co. v. Burley, 325 U.S. 711, 722-726, 89 L. Ed. 1886, 1894, 1896, 65 S. Ct. 1282 (1945). Rather than rely upon compulsory arbitration, to which both sides were bitterly opposed, the railroad and union representatives who drafted the Act chose to leave the settlement of major disputes entirely to the processes of non-compulsory adjustment. Id., at 724, 89 L. Ed. at 1895. To this end, the Act established rather elaborate machinery for negotiation, mediation, voluntary arbitration, and conciliation. General Committee, B.L.E. v. Missouri-K.-T.R. Co., 320 U.S. 323, 328-333, 88 L. Ed. 76, 79, 82, 64 S. Ct. 146 (1943). It imposed upon the parties an obligation to make every reasonable effort to negotiate a settlement and to refrain from altering the status quo by resorting to self-help while the Act's remedies were being exhausted. Railroad Trainmen v. Terminal Co., 394 U.S. 369, 378, 22 L. Ed. 2d 344, 354, 89 S. Ct. 1109 (1969); Elgin, J. & E.R. Co. v. Burley, supra, at 721-731, 89 L. Ed. 1886 at 1893; Texas & N.O.R. Co. v. Railway Clerks, 281 U.S. 548, 565-566, 74 L. Ed. 1034, 1044, 50 S. Ct. 427 (1930). A final and crucial aspect of the Act was the power given to the parties and to representatives of the public to make the exhaustion of the Act's remedies an almost interminable process.
> . . .
>
> . . .
>
> "The Act's status quo requirement[s] [are] central to its design. . . ."
>
> . . .
>
> "The obligation of both parties during a period in which any of these status quo provisions is properly invoked is to preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute.
>
> . . .
>
> "It would be virtually impossible to include all working conditions in a collective-bargaining agreement. Where a condition is satisfactorily tolerable to both sides, it is often omitted from the agreement, and it has been suggested that this practice is more frequent in the railroad industry than in most others. When the union moves to bring such a previously uncovered condition within the agreement, it is absolutely essential that the status quo provisions of

> the Act apply to that working condition if the purpose of the Act is to be fulfilled. If the railroad is free at this stage to take advantage of the agreement's silence and resort to self-help, the union cannot be expected to hold back its own economic weapons, including the strike. *Only if both sides are equally restrained can the Act's remedies work effectively.*" (Emphasis supplied.) 396 U.S. at 148, 150, 152, 153, 155.

The parties to this litigation agree that the pay period is a working condition. We have concluded that the Act of 1971, P.L. 221, is an attempt on the part of the state to regulate this working condition in the interest of employes; that it has the effect of changing working conditions without the notice and bargaining requirements of The Railway Labor Act; that it is an interference with and an intrusion upon Federal requirements; and that it offends the Supremacy and Commerce clauses hereinbefore cited. Although the Act of 1971 is expressly subject to the provisions of existing labor agreements, it can and in this case does change a customary working condition contrary to Section 6 of The Railway Labor Act as interpreted by *Detroit & Toledo Shore Line Railway Company v. United Transportation Union, supra.* It substitutes for customary conditions, until an agreement is reached, the heavy and immediate hand of state law for the collective bargaining process which Congress has declared to be the best and only means of changing such conditions. If we should hold that Pennsylvania may regulate customary pay periods without the agreement of the parties required by The Railway Labor Act, the state could similarly effect (and except for our supersedeas would have here effected) changes in existing practices so drastic as to render subsequent bargaining thereon pointless. Or, state regulations could be instituted during bargaining, arbitration or mediation under The Federal Railway Act so favorable to one of the parties as to render it impossible realistically for the representatives of that party to relinquish the advantage so conferred at the bargaining table although the other party is prepared for a work stoppage unless a change is made.

The Act of 1971, P.L. 221 is artful in its express subservience to hiring contracts and labor agreements and we would have more difficulty finding interference with Federal requirements had the Act expressly exempted customary practices or had the Secretary construed the Act as intending the exemption of customary practices. We do not quarrel with the Secretary's construction, for if the Act is not intended to act on customary pay periods different from the weekly requirement it stipulates, there is nothing for it to act upon, unless there is somewhere in Pennsylvania a railroad enterprise with no labor agreement. The result is that the appellants have been ordered instantly to change a working condition other than by the procedures of The Railway Labor Act. This brings the case clearly within the rulings of *California v. Taylor,* 353 U.S. 553 (1957), holding that a state statute denying state employes collective bargaining rights was superceded as to employes of a state owned railroad by The Railway Labor Act, and *Local 24, I.B. of T. v. Oliver,* 358 U.S. 283 (1959), holding that a state antitrust law must give way to provisions of a labor agreement reached under the provisions of the National Labor Relations Act.

The case [3] and dicta from other cases relied upon by the Secretary deal with state health and safety regulations and have no application here. The distinction is fully explained and the cases analyzed by the California District

3. *Terminal Railroad Association v. Brotherhood of Railroad Trainmen,* 318 U.S. 1 (1943). *See Bessemer & L.E.R.R. v. Pennsylvania P.U.C.,* 430 Pa. 339, 243 A. 2d 358 (1968).

Court of Appeals in *United Airlines Inc. v. Industrial Welfare Commission*, 28 Cal. Reporter 238 (1963) where it was held that a state may not impose regulations on working conditions not related to health and safety because the Railway Labor Act has preempted the field, leaving the regulation to bargaining agreements between employes and employer. That holding and the reasoning of the opinion on which it is based are persuasive and are followed here.

In view of our holding based upon the Supremacy and Commerce clauses, it is unnecessary for us to comment upon the appellants' arguments based upon the Fourteenth Amendment and Article III Section 32 of the Pennsylvania Constitution, beyond commenting that we have concluded that the Legislature's classification of railroad workers is reasonable and that its imposition of this regulation upon the class of raiload workers is not special legislation.

ORDER.

AND NOW, this 11th day of February, 1974, the appeal of the Baltimore and Ohio Railroad Co. and Western Maryland Railway Company is sustained and the order of the Secretary is set aside.

/s/ THEODORE O. ROGERS,
Theodore O. Rogers, *J.*

DISSENTING OPINION.

DISSENTING OPINION BY JUDGE BLATT

FILED: February 11, 1974

I must respectfully dissent. Although I agree with the statement of the majority that "the Legislature's classification of railroad workers is reasonable and that its imposition of this regulation upon the class of railroad workers is not special legislation", I do not agree that the Act of July 14, 1971, P.L. 221, 43 P.S. § 255.1 (hereinafter Act No. 43), is in conflict with and superseded by The Railway Labor Act, 45 U.S.C.A. § 151 et seq.

The question of whether or not a state law is invalid as conflicting with Federal laws touching the same subject is not to be determined according to any rigid formula or rule, but depends upon whether, under the circumstances of the particular case, the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the statute in question. *Perez v. Campbell*, 402 U.S. 637 (1971); *Hines v. Davidowitz*, 312 U.S. 52 (1941). Some of the general criteria which might be applied, however, include whether or not: 1) the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it; 2) the federal statute touches a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the subject; or 3) the enforcement of the state act presents a serious danger of conflict with the administration of the federal program. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

As the majority notes, the Railway Labor Act is intended, *inter alia*, to avoid interruption in commerce or the operation of any railroad by providing for the prompt

and orderly settlements of all disputes concerning rates of pay, rules or working conditions. It does not undertake governmental regulation of these matters but instead provides a means, collective bargaining, by which agreement thereon may be reached. Enactment of state laws which deal with working conditions on railroads does not result in a conflict with the Railway Labor Act, therefore, unless such state laws in some manner interfere with the procedures by which employer-employee agreements are to be reached,[1] for the Railway Labor Act was not intended to preempt the field of regulating working conditions themselves. *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943).

Act No. 43 does not interfere with the expressed purposes of the Railway Labor Act and it in no way affects the means by which agreement may be reached between parties with respect to wages, hours, or working conditions. Even in situations where the statute is effective, the parties are still free to bargain over the matter of pay periods and are not compelled to reach any particular agreement thereon, and the statutory pay period can be changed or continued in effect by agreement of the parties.

Act No. 43, it seems to me, does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the Railway Labor Act, and this interpretation is in no way in conflict with the reasoning in *Detroit and Toledo Shore Line Railroad Company v. United Transportation Union*, 396 U.S. 142 (1969). That case was not concerned with

1. This was the situation in *California v. Taylor*, 353 U.S. 553 (1957), wherein the state attempted to prohibit employees of a state-owned railroad from bargaining collectively because of the state policy that no state employees had the right to bargain. The Supreme Court there held that such policy was in conflict with the Railway Labor Act and thus invalid.

retaining the status quo *per se* as applied to working conditions, but only with obliging the *parties* not to change the status quo while the procedures of the Railway Labor Act for settling disputes were being exhausted. As such, that policy retained the Act's primary objective, i.e., the prevention of strikes, an objective which will not be affected by the operation of Act No. 43.

I would affirm the order of the Department of Labor and Industry.

/s/ Genevieve Blatt
Genevieve Blatt, Judge

Judge Kramer joins in this dissent.

COMMONWEALTH OF PENNSYLVANIA
Department of Labor and Industry

—

IN RE:

UNITED TRANSPORTATION UNION

v.

BALTIMORE AND OHIO RAILROAD and
WESTERN MARYLAND RAILWAY COMPANY

—

RECOMMENDATIONS AND FINDINGS OF HEARING EXAMINER.

I. DISCUSSION.

On July 14, 1971, the Governor of the Commonwealth of Pennsylvania signed Act No. 43 of 1971, 43 P.S. § 255.1 et seq., providing in pertinent part as follows:

> Section 1. Unless other stipulated in the contract of hiring or in the applicable labor agreement, every common carrier by railroad or corporation or joint stock association, operating a steam, electric, or diesel surface railroad, or engaged in the sleeping car business, or carrying on the business thereof by lease or otherwise, shall pay once each week to each employe, the wages earned for the even day period ending not more than fourteen days prior to such payment. Wages as the term is herein used shall be limited to those derived from basic pro rata rates of pay pursuant to a labor agreement, and shall not include incentives, bonuses, and other similar types of fringe payments.
>
> Section 2. The last payment of wages under existing law shall be made on or before January 14, 1972, and the first payment of wages under section 1 of this act shall be made on or before January 21, 1972.

By formal complaints filed with this Department* the United Transportation Union alleges that the Baltimore and Ohio Railroad Company and the Western Maryland Railway Company are not in compliance with the Act. After informal attempts were made to secure an agreement with regard to compliance, both complaints were set for oral hearing in Harrisburg on January 15, 1973, at which time the proceedings were consolidated.

The Hearing Officer appointed by the Secretary of Labor and Industry was Charles S. Solit, Esquire. T. P. Shearer appeared for the United Transportation Union, Joseph B. Geyer for the Baltimore and Ohio Railroad and Douglas V. Pope and W. B. Tittsworth, Jr. for the Western Maryland Railway Company. Six witnesses were called and 14 exhibits were admitted into evidence. A verbatim transcript of the hearing was made.

Initially it should be noted that the weekly pay period requirement of the Pennsylvania Act is not mandatory if there is stipulation to the contrary in the contract of hiring or in the applicable labor agreement. The sole issue involved is whether or not the contract of hiring or the collective bargaining agreements provide for payments on other than a weekly basis.

It would appear that under the Railway Labor Act, 45 USC § 151 et seq., "rates of pay, rules, or working conditions" cannot be changed unilaterally even though such changes are not prohibited by the existing collective bar-

* In the absence of any specific designation in the Act itself, the duty of enforcement was held to be that of the Department of Labor and Industry by the Attorney General because this Department is responsible for the enforcement of other wage legislation.

gaining agreement. *The Detroit and Toledo Shore Line R. Co. v. UTU,* 90 S. Ct. 294, 396 U.S. 142.

It would further appear and we so find that the customary pay periods are a working condition which can only be changed pursuant to the Railway Labor Act or by the operation of a law such as Act 43.

The question then remains as to whether such customary pay periods are embraced within the phrase "otherwise stipulated in the contract of hiring or in the applicable labor agreement."

This question is one of first impression. It has not been decided by the courts. It is, therefore, our duty to make an initial determination as to the proper construction of the Act.

Levinson v. Spector Motor Service, 67 S. Ct. 931, 330 U.S. 649.
N.L.R.B. v. Hearst Publications, 64 S. Ct. 851, 332 U.S. 111.
Unemployment Compensation Commission of Alaska v. Aragan, 67 S. Ct. 245, 329 U.S. 143.
International Packers, Ltd. v. F.M.C., 356 F.2d 808.
Hotel Casey v. Ross, 23 Atl.2d 737, 343 Pa. 573.

It is obvious that if the customary pay periods are held to be within and form a part of the contract of hiring or the collective bargaining agreement the legislative intent would be thwarted as the Act would have no effect whatsoever. We find that they are not. Our conclusion is reinforced by the fact that the courts have long held that "working conditions" are separate and distinct from the collective bargaining agreement. Cf. *The Detroit and Toledo Shore Line R. Co. v. UTU,* supra. Nor do we believe that "working conditions" can properly be brought within the ambit of the phrase "contract of hiring."

Therefore, we find the "collective bargaining agreement" and any "contract of hiring" as used in Act 43 to be the original written contract or agreement together with any written amendments thereto.

In order to avoid the obligation imposed by the Act, it is therefore determined that a railroad must show a specific provision for a pay period other than that required by the Act in either the "contract of hiring" or the "collective bargaining agreement."

It further appears from the evidence that employees of B & O working in the crafts and classes of firemen, conductors and trainmen are represented by the United Transportation Union (UTU), a labor organization national in scope, duly certified by the National Mediation Board as the collective bargaining agent of such employees under the Railway Labor Act. Prior to 1969, employees working as firemen were represented by the Brotherhood of Locomotive Firemen and Enginemen (B.L.F. & E.); those working as conductors were represented by the Order of Railway Conductors and Brakemen (ORC&B); and, those working as trainmen or yardmen were represented by the Brotherhood of Railroad Trainmen (BRT). On January 1, 1969, these three unions, together with one union (Switchmen's Union of North America), were merged into a single union which is now designated as noted above, UTU. The collective bargaining agreements in existence prior to 1969 were continued in full force and effect and each former union continues to have its separate General Chairman who is the duly authorized bargaining agent for said union. The present Chairman of the BRT (now known as UTU-T) is George P. Stanton. The present General Chairman of ORC&B (now known as UTU-C) is John F. Kalfas. The present General Chairman of the BLF&E (now known as UTU-E) are James Duncan and

Wayne A. Adamson (the latter being General Chairman of the former BLF&E for the Buffalo Division). Collective bargaining agreements exist between the Baltimore and Ohio and each of these four groups.

Similarly, on the Western Maryland, two collective bargaining agreements now exist.

It is, therefore, only necessary to examine the evidence to determine whether each of these collective bargaining agreements provided for wage payments other than as required by Act 43 as no evidence relative to contracts of hiring was submitted.

The four (4) collective bargaining agreements on the Baltimore & Ohio involved herein are as follows:

1. Former members of the Brotherhood of Railroad Trainmen, G. P. Stanton, General Chairman.

2. Former members of the Order of Railway Conductors, J. F. Kalfas, General Chairman.

3. Former members of the Brotherhood of Locomotive Firemen and Enginemen excluding the Buffalo Division, J. M. Duncan, General Chairman.

4. Former members of the Brotherhood of Locomotive Firemen and Enginemen on the Buffalo Division, Wayne A. Adamson, General Chairman.

Consideration of the Western Maryland involves an examination of two (2) collective bargaining agreements:

5. Former members of the Brotherhood of Railroad Trainmen, Van H. Parsons, General Chairman.

6. Former members of the Brotherhood of Locomotive Firemen and Enginemen,
R. D. Dilligatti, General Chairman.

II. Findings of Fact.

A. Brotherhood of Railroad Trainmen, *Baltimore & Ohio.*

1. George P. Stanton, Sr. is the General Chairman, United Transportation Union, Trainmen's Committee of the Chesapeake, and as such represents trainmen over the entire B & O system, including the State of Pennsylvania.

2. The former trainmen were paid twice a month until August, 1959, when this procedure was changed pursuant to an agreement with the Former Brotherhood of Railroad Trainmen which is binding and still in effect, to a payday every 14 days.

3. The new pay procedure was negotiated by the General Chairmen's Association on the Baltimore & Ohio, said Association being a voluntary one to which the former Trainmen belonged and still belong and which meets twice a year.

4. The Association had reached a tentative agreement with the Baltimore & Ohio relative to 14 day pay periods whereupon the former Trainmen (who had served appropriate "Section 6" notice under the Railway Labor Act seeking a change in the semi-monthly pay procedure) withdrew their individual demand under the Railway Labor Act and endorsed the Association's agreement.

5. The aforesaid endorsement was by letter properly signed by the appropriate Trainmen officials.

6. Mr. Stanton, the present General Chairman, recognizes this agreement as binding not because the General Chairmen's Association made it, but because the former Trainmen endorsed it in writing.

7. It appears from the evidence presented and I so find that insofar as the Former Brotherhood of Railroad

Trainmen, Baltimore & Ohio, is concerned, there is a provision in its collective bargaining agreement for other than weekly pay and as to them Act No. 43 does not apply.

B. Order of Railway Conductors, *Baltimore and Ohio.*

8. John F. Kalfas, Jr. is the General Chairman for the Conductors of the United Transportation Union and formerly the General Chairman for the Conductors of the former Order of Railway Conductors and Brakemen.

9. Mr. Kalfas testified that his organization has no agreement with Baltimore and Ohio relative to frequency of pay periods and that his organization is not presently and never was a member of the General Chairmen's Association and has never ratified any association agreement.

10. We find that the collective bargaining agreement of the former Conductors represented by Mr. Kalfas does not contain any specific provisions for frequency of pay periods and that, accordingly, Act No. 43 would be applicable in this instance.

C. Brotherhood of Locomotive Firemen and Enginemen, Excluding the Buffalo Division, *Baltimore and Ohio.*

11. No testimony regarding the collective bargaining agreement of this organization was introduced during the hearing and, accordingly, we find that the pay provisions of Act No. 43 are applicable to this group in this instance.

D. Brotherhood of Locomotive Firemen and Enginemen on the Buffalo Division, *Baltimore and Ohio.*

12. Wayne A. Adamson is the General Chairman on the Baltimore and Ohio Railroad, Buffalo Division, and

represents Baltimore and Ohio employees who work in the Commonwealth of Pennsylvania and New York State.

13. Mr. Adamson's uncontradicted testimony was that the collective bargaining agreement covering the employees he represented contained no agreement relative to pay and that his organization was not now and never had been a member of the General Chairmen's Association.

14. Mr. Adamson testified that those members of his group who worked in New York State were paid on a weekly basis in accordance with the requirements of the New York State law which has been in effect since 1956.

15. We, accordingly, find that this group must be paid on a weekly basis pursuant to the requirements of Act No. 43.

E. Brotherhood of Railroad Trainmen, *Western Maryland.*

16. Fred B. Plummer, Manager of Labor Relations for Western Maryland, testified that he considered the pay periods to be an operating practice or working conditions which could only be changed as a result of a so-called Section 6 notice under the Railway Labor Act.

17. The testimony indicates that on June 3, 1957, all of the General Chairmen, including the two groups now members of the United Transportation Union, served a Notice upon the Western Maryland seeking to change the frequency of wage payment (then being paid on a twice-monthly basis) so that all employees would be paid on Friday of each week.

18. Said notice was signed on behalf of the Trainmen by their then and now General Chairman. (Exhibit A and Exhibit A-1).

19. On July 12, 1957, the Western Maryland denied this request by letter to Mr. Carroll, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and President of the Associated General Chairmen (Exhibit B). Copies of the July 12, 1957 letter were sent to representatives of the two organizations herein involved.

20. On October 24, 1957, another meeting was held at which time the union proposal was modified after which the Western Maryland by letter dated November 1, 1957, denied the proposal as modified (Exhibit C). After this time no action was taken until June of 1959.

21. On June 15, 1959, a request which could be construed as a Section 6 notice was addressed to the Western Maryland by J. C. Hopkins, President of the Associated General Chairmen and also General Chairman of the Brotherhood of Locomotive Firemen and Enginemen (Exhibit D). It was not signed by any representative of the Brotherhood of Railroad Trainmen, but purported to be made on their behalf among others.

22. At a meeting on October 16, 1959, Western Maryland offered to institute a bi-weekly in lieu of twice each month pay provided that it be standardized for all employees. This was confirmed by letter dated October 19, 1959 (Exhibit F).

23. On December 5, 1959, Mr. Hopkins advised the Western Maryland that the conditions required were accepted (Exhibit G). Mr. Hopkins purported to act for all of the General Chairmen.

24. In the letter of January 9, 1960 (Exhibit I), addressed to the Western Maryland by Mr. Hopkins, he stated that notice of concurrence with the bi-weekly pay

proposal was received from Mr. Parsons of the Brotherhood of Railroad Trainmen. There is no indication in this letter as to whether such notice was oral or written.

25. The bi-weekly pay period was placed in effect by the Western Maryland as a result of these negotiations on April 16, 1960.

26. Mr. Plummer felt that Western Maryland had a "labor agreement" as contemplated in Act No. 43 which would exclude them from paying wages to this group on a weekly basis.

27. Van H. Parsons has been the General Chairman of the Former Brotherhood of Railroad Trainmen since 1949 and stated that it is the policy of the Brotherhood of Railroad Trainmen and the United Transportation Union that only duly designated officers of the labor union can sign Section 6 notices and sign agreements.

28. Mr. Parsons contends that the Associated General Chairmen were authorized to act for him in its attempts to convert the twice monthly pay procedure to a bi-weekly procedure, but he considers this change to be a mere bookkeeping transaction.

29. Nothing in the record was presented which can be construed as an amendment or addendum to the Trainmen's collective bargaining agreement and nothing with the signature of any Trainmen or United Transportation Union official was introduced which could be interpreted as such.

30. We find that the collective bargaining agreement of the Former Trainmen does not include a provision for other than weekly pay and that compliance with Act 43 is necessary.

F. Brotherhood of Locomotive Firemen and Enginemen, *Western Maryland.*

31. In view of the fact that Exhibits D and I are signed by Mr. J. C. Hopkins not only as President of the Associated General Chairmen but also as President of the Former Brotherhood of Locomotive Firemen and Enginemen, it is clear that the BLF&E has a fully operative collective bargaining agreement with the Western Maryland requiring bi-weekly pay. Compliance with Act No. 43 is, therefore, not required under the exclusionary conditions set forth therein.

Conclusions of Law.

1. The Baltimore and Ohio Railroad and the Western Maryland Railway Company are common carriers by railroad as set forth in Section 1 of Act No. 43 of 1971, 43 P.S. § 255.1.

2. A change in a working condition to which the organization involved assented but not in writing cannot, under our interpretation of "collective bargaining agreement," become a part of such agreement.

3. There is no "applicable labor agreement" with respect to those employees covered by the collective bargaining agreements of the former BLF&E and the former Order of Railway Conductors employed by the Baltimore and Ohio Railroad which would not require its compliance with Act No. 43 of 1971, 43 P.S. § 255.1.

4. There is no "applicable labor agreement" with respect to those employees covered by the collective bargaining agreements of the Former Brotherhood of Railroad Trainmen employed by the Western Maryland Railway Company which would not require its compliance with Act No. 43 of 1971, 43 P.S. § 255.1.

ORDER.

And Now, this 5th day of April, 1973, it is Ordered that the Baltimore and Ohio Railroad as soon as practicable and in any event no later than sixty (60) days from date hereof to bring itself into compliance with Act 43 of 1971 and pay those employees covered by the collective bargaining agreements of the former B.L.F.&E. and the former Order of Railway Conductors in accordance with said Act.

It is further Ordered that as soon as practicable and no later than sixty (60) days from date hereof the Western Maryland Railway Company institute compliance with Act 43 of 1971 and pay those employees covered by the collective bargaining agreement of the Former Brotherhood of Railroad Trainmen in accordance with said Act.

Charles S. Solit,
Charles S. Solit,
General Counsel and Hearing Examiner,
Department of Labor and Industry.

Approved and adopted as the Findings and Order of the Department of Labor and Industry.

Paul J. Smith,
Paul J. Smith,
Secretary of Labor and Industry.
April 5, 1973.

Exhibit "A".

(Letterhead of)
SYSTEM BOARD OF ADJUSTMENT
BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
Western Maryland Railway Company

Baltimore, Md.
June 3, 1957

Mr. F. B. Plummer, Manager of Labor Relations
Western Maryland Railway Company
605 Standard Oil Building
Baltimore 2, Md.

Dear Sir:

In conformity with provisions of Section 6, of the Railway Labor Act, I am attaching hereto formal notice upon Carrier for the establishment between organizations and carrier of a pay period rule providing for a pay on Friday of each week.

Please advise time, date and place we may confer with you on this request.

Very truly yours
/s/ J. F. CARROLL
President
Associated General Chairmen
Western Maryland Railway Company

Exhibit "A-1".

Hagerstown, Maryland
May 13, 1957

Mr. F. B. Plummer, Manager of Labor Relations
Western Maryland Railway Company
605 Standard Oil Building
Baltimore 2, Maryland

Dear Sir:

While it is the position of the Committee representing the employees under the respective agreements, between the Carrier and the Brotherhood of Railroad Trainmen, Brotherhood of Locomotive Firemen and Enginemen, System Federation #30, Railroad Employees Department, A.F. of L. & C.I.O. The Order of Railroad Telegraphers, Railroad Signalmen of America, Brotherhood of M of W Department, Brotherhood of Railway & Steam Clerks.

Because of the questions raised by the employees of the above listed Organizations in connection with a weekly pay.

The Committees do now serve formal notice upon the Carrier in conformity with the provisions of Section 6 of the Railroad Labor Act for the establishment of a pay period rule providing for a pay on Friday of each week, between the Organization and the Carrier as reflected in this notice.

Please advise time, date and place we may confer wtih you on this request.

Yours Truly

V. H. PARSONS
General Chairman
Brotherhood of Railroad Trainmen

P. J. SHOOK
General Chairman
Brotherhood of Locomotive Firemen & Enginemen

A. H. STEARNS
President
System Federation #30
Railway Employees Department A.F. of L. C.I.O.

C. G. BITTORF
General Chairman
The Order of Railroad Telegraphers

H. C. GUSCOTT
General Chairman
Brotherhood of Railway Signalmen of America

General Chairman
Brotherhood of Maintenance of Way Employees Department

J. C. CARROLL
General Chairman
Brotherhood of Railway & Steamship Clerks

Exhibit "B".

(Letterhead of)
WESTERN MARYLAND RAILWAY COMPANY

Personnel Department
501 St. Paul Place, Baltimore 2, Md.

F. B. Plummer
Manager of Labor Relations

July 12, 1957

Mr. J. C. Carroll, President
Associated General Chairman
Western Maryland Railway Company
111 Beaumont Avenue
Baltimore 28, Maryland

Dear Sir:

This has reference to formal notice served by you under date of May 13, 1957 proposing the establishment of a pay period rule providing for pay on Friday of each week. In accordance with Section 6 of the Railway Labor Act, as amended, initial conference to discuss this notice was held on July 2, 1957.

Your proposal has been given very careful consideration and we feel forced to deny it. Our analysis indicates that a weekly pay would be inefficient from an accounting standpoint and would lead to a substantial increase in payroll preparation costs. There are several prerequisites which a weekly pay would entail, some of which were mentioned at the meeting on July 2nd, and if you choose to pursue the matter those prerequisites must be met before any further consideration could be given to your

proposal. Since several organizations have not yet participated in the handling of this proposal, their status should be clarified before any further action is taken.

Very truly yours,
/s/ F. B. PLUMMER

FBP:nk
Copy to:
Messrs. V. H. Parsons, BRT
A. H. Stearns, Sys. Fed. 30
P. J. Shook, BLF&E
C. G. Bittorf, ORT
H. C. Guscott, BRSA

Exhibit "C".

———

(Letterhead of)
WESTERN MARYLAND RAILWAY COMPANY
Personnel Department
300 St. Paul Place, Baltimore 2, Md.

F. B. Plummer
Manager of Labor Relations

November 1, 1957

Mr. J. C. Carroll, President
Associated General Chairmen
Western Maryland Railway Company
111 Beaumont Avenue
Baltimore 28, Maryland

Dear Sir:

Referring to formal notice served by you under date of May 13, 1957, proposing the establishment of a pay-period rule providing for pay on Friday of each week, and your verbal modification of that proposal at meeting on October 24, 1957, requesting a pay day on every other Friday.

This will confirm the Company's position at the October 24 conference that a bi-weekly pay date would cause inefficiencies and administrative problems which would make it impracticable. For that reason, plus other external factors which enter into the situation, it is necessary

for me to advise you that your proposal can not be placed into effect.

Yours very truly,

F. B. PLUMMER

a.

cc: Messrs.
V. H. Parsons, GC, BRT
P. J. Shook, GC, BLF&E
A. H. Stearns, Pres., Sys. Fed. 30
C. G. Bittorf, GC, ORT
H. C. Guscott, GC, BRSA
F. S. Poling, GC, BMWE

Exhibit "D".

(Letterhead of)
BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN
General Grievance Committee—Western Maryland System

Hagerstown, Md.
June 15, 1959.

Mr. F. B. Plummer,
Manager of Labor Relations,
Western Maryland Railway Co.,
300 St. Paul Place,
Baltimore 2, Maryland.

Dear Sir:

The undersigned has been authorized by the below listed Committee representatives of the employees under their respective agreements with the Western Maryland Railway Company, to serve notice on the Carrier requesting the establishment of a bi-weekly pay period rule providing for a pay day on every other Friday, with a proviso that should a holiday fall on that Friday, then the pay day will be on the prior Thursday.

This rule to become effective as soon as possible but in no event later than August 1, 1959.

Mr. V. H. Parsons, General Chairman,
Brotherhood of Railroad Trainmen

Mr. A. G. Fouche, General Chairman,
Brotherhood of Railway & Steamship Clerks

Mr. C. G. Bittorf, General Chairman,
The Order of Railroad Telegraphers

Mr. H. C. Guscott, General Chairman,
Brotherhood of Railroad Signalmen of America

Mr. A. H. Stearns, President,
System Federation No. 30, Railway Employees,
Department A. F. of L, and C.I.O.

Mr. J. C. Hopkins, General Chairman,
Brotherhood of Locomotive Firemen and Enginemen

Please advise time, date and place we may confer with you on this request.

Your truly,

J. C. HOPKINS,
J. C. Hopkins,
President,
Associated General Chairmen,
Western Maryland System

cc:
Members AGC

Exhibit "F".

October 19, 1959

Mr. J. C. Hopkins, President
Association of General Chairmen
Western Maryland System
622 Potomac Avenue
Hagerstown, Maryland

Dear Mr. Hopkins:

This has reference to our meeting on October 16, 1959, to discuss the proposal of the Association of General Chairmen for a bi-weekly pay.

Your proposition has been studied carefully. We feel that acceptance of the bi-weekly pay principle by the Company must be premised on acceptance by the Association of the following which we consider basic essentials to the efficient and economical administration of such a plan:

1. Standardization in the handling of pay for all employees represented by the Association.
2. A 14-day interval between the end of the pay period and pay date.

We are willing to progress your request on this basis; however, in accordance with your request at the October 16 meeting, no further action will be taken by us pending an expression from you after handling with other members of the Association.

Yours very truly,

(Signed) F. B. PLUMMER

a.

Exhibit "G".

(Letterhead of)
BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN
General Grievance Committee—Western Maryland System

Hagerstown, Md.
December 5, 1959.

Mr. F. B. Plummer,
Manager of Labor Relations,
Western Maryland Railway Co.,
300 S. Paul Place,
Baltimore 2, Maryland.

Dear Sir:

Reference is made to your letter of October 19, 1959, concerning our meeting in Baltimore on October 16th at which time we discussed the proposal of the Association of General Chairmen, Western Maryland System, for a bi weekly pay day.

The two points stipulated in your letter as being basic essentials necessary before acceptance of the bi-weekly pay principle by the Company were made known to the Association members and in reply they have advised this office of their concurrence with the points in question.

Accordingly, and in line with our understanding we desire that our proposal now be progressed to a conclusion with the purpose in mind of instituting the bi-weekly pay day as soon as possible, but not later than April 15, 1960.

In the interim the members desire to meet with you to discuss the method of transition.

Please acknowledge and advise.

Very truly yours,

J. C. HOPKINS,
J. C. Hopkins,
President,
Assoc. of Gen. Chair.,
West. Md. Rwy Sys.

cc: Members Assoc.

Exhibit "I".

(Letterhead of)
BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN
General Grievance Committee—Western Maryland System

Hagerstown, Md.
January 9, 1960.

Mr. F. B. Plummer,
Manager of Labor Relations,
Western Maryland Railway Co.,
300 St. Paul Place,
Baltimore 2, Maryland.

Dear Mr. Plummer:

In reply to your letter of December 24, 1959, concerning the Memorandum—Biweekly Payroll Proposals, containing the proposed schedule of transition leading up to the effective date of biweekly pay period of April 16, 1960.

Please be advised that as of this date notice of concurrence with the Memorandum—Biweekly Payroll Proposals, have been received from the following members of the Association of General Chairmen, Western Maryland System:

Mr. O. A. Anthony, President, Syst. Fed. No. 30.

Mr. V. H. Parsons, General Chairman, Bro. Railroad Trainmen.

Mr. H. C. Guscott, General Chairman, Bro. Railroad Signalmen.

Mr. C. G. Bittorf, General Chairman, Oder. Railroad Teleg.

Mr. A. C. Fouche, General Chairman, Bro. Railway Clerks.

Mr. Fred. S. Poling, General Chairman, Bro. Maint. Way Emps.

And as general chairman of the B. of L. F. & E., the undersigned is also in accord with the schedule of transition.

In accordance with the above authorizations, please consider this your authorization to place the proposed schedule of transition into effect, with the understanding the pay period will be as proposed, effective April 16, 1960.

Will you be kind enough to have posted over the system, the schedule of pay days between now and April 16th, as information for all employes concerned, copy to the undersigned.

Yours very truly,

/s/ J. C. HOPKINS
J. C. Hopkins,
President, A. G. C.,
Western Maryland System.

cc: Members A. G. C.

Supreme Court, U. S.
FILED
JUL 16 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1581

BALTIMORE & OHIO RAILROAD COMPANY and
WESTERN MARYLAND RAILWAY COMPANY,
Appellants,

v.

COMMONWEALTH OF PENNSYLVANIA and
UNITED TRANSPORTATION UNION,
Appellees.

On Appeal from the Supreme Court of Pennsylvania

MOTION TO DISMISS OR AFFIRM

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July 1975

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1581

BALTIMORE & OHIO RAILROAD COMPANY and WESTERN MARYLAND RAILWAY COMPANY,
Appellants,

v.

COMMONWEALTH OF PENNSYLVANIA and UNITED TRANSPORTATION UNION,
Appellees.

On Appeal from the Supreme Court of Pennsylvania

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16(1) of the Rules of this Court, the Commonwealth of Pennsylvania and the United Transportation Union move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania, on the ground that it does not present a substantial federal question, and that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

This appeal involves the validity of a 1971 Pennsylvania statute which requires that railroad employees be paid weekly, unless otherwise stipulated in the contract of hiring or in an applicable labor agreement. Prior to 1971, railroad personnel were governed by a 1913 statute, which applies to all industry, and which specifies semi-monthly payment.

The Supreme Court of Pennsylvania sustained the validity of the statute against the challenge of two railroads that the 1971 law contravenes the Railway Labor Act, 45 U.S.C. 151, *et seq.*

We are in general accord with the appellant railroads' statement of the case, insofar as it describes the manner in which this controversy reached this Court[1]:

---

[1] We disagree as to a factual matter. All of the bargaining units involved have *not* been in negotiations relative to wage payments, contrary to the Jurisdictional Statement. (J.S., 4-5). Three of the four bargaining units on the B&O were involved in no negotiations whatsoever, as found by the Hearing Examiner in Findings No. 9, 11, and 13. (J.S., A44-A45). One unit had an agreement requiring 14-day pay periods, as shown in Findings No. 4 and 5 (J.S. A43), but other units were not even members of the Association of General Chairmen, as shown in Findings No. 9, 11 and 13. (J.S., A44-45). With respect to the other appellant, Western Maryland Ry. Co., one bargaining unit had a fully operative bargaining agreement requiring bi-weekly pay (Finding No. 31; J.S., A48), while the other, although involved in some negotiations, was found to have no such agreement (Findings No. 29 & 30; J.S., A47).

ARGUMENT

I

THE APPEAL IS INCONSEQUENTIAL

The issues presented herein reputedly involve questions of federal supremacy and preemption. In reality, the ultimate issue presented is whether a number of railroad workers in Pennsylvania are to receive their wages every 7 days, instead of every 15 days. No amount of semantics can convert this issue into one warranting the attention of this Court.

The frivolity of appellants' appeal is compounded when it is considered that a declaration by this Court to the effect that the Pennsylvania Act of July 14, 1971, P.L. 221, No. 43, P.S. § 255.1 (hereinafter referred to as Act No. 43) is invalid would, by necessary implication, also invalidate the Pennsylvania Act of April 24, 1913, P.L. 114, 43 P.S. § 251 (hereinafter referred to as the Act of 1913). The Act of 1913 (providing for the semi-monthly payment of wages to all employees of the Commonwealth of Pennsylvania) was repealed in part by Act No. 43 (providing for weekly payment of wages to railroad employees).

Act No. 43 has been complied with by all railroads with the exception of the two appellants. The Act of 1913, however, has been complied with by all Pennsylvania employers, including appellants, for over 60 years. Thus, it is difficult, if not impossible, to justify appellants' attack on Act No. 43 on the basis that it is a state legislative enactment, when appellants have apparently been satisfied with the former state legislative enactment for over 60 years. Therefore, appellants' position seems based, in reality, upon dissatisfaction with the distinction between the two statutes – 8 days. To assuage this dissatisfaction, the two railroads would have both enactments declared invalid as to all railroad employees.

II

THIS APPEAL PRESENTS NO SUBSTANTIAL QUESTION OF FEDERAL LAW

The two railroad appellants present two grounds upon which they urge that a state statute should be declared invalid because of the operation and scheme of a federal statute. The first reputed ground urged as a basis for the invalidity of the state statute is that the operation and scheme of the federal statute preclude all state legislation in the same field, even without an actual conflict – *i.e.*, invalidity based upon "preemption" or "supersession". The second reputed ground urged as a basis for the invalidity of the state statute is that an actual conflict exists between the state statute and the federal statute – *i.e.*, invalidity based upon federal "supremacy". Upon neither of these reputed grounds does this appeal present a substantial question of federal law warranting the time or attention of this Court.

A. Preemption.

Justice Roberts correctly stated the test for federal preemption in the Pennsylvania Supreme Court opinion below (J.S., A10):

> "'The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field . . .'." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S. Ct. 1210, 1217 (1963, hereinafter referred to as *Florida Lime*).

The field of operation of the federal statute involved in this appeal is claimed to be the Railway Labor Act. Section 6 of the Railway Labor Act, 45 U.S.C. § 156, provides in pertinent part:

> "Carriers and representatives of the employees shall give at least thirty days written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intedned change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by Section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

This Court, upon considering the Railway Labor Act in *Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad Co.*, 372 U.S. 284, 289-290 (1963), described the field embraced by the Railway Labor Act as follows:

> "The Railway Labor Act . . . does not undertake governmental regulation of wages, hours, or working conditions. Instead, *it seeks to provide a means*

> *by which agreement may be reached* with respect to them. The national interest . . . is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about working conditions does not reach the point of interfering with interstate commerce." [Emphasis Supplied].

Thus, it is obvious from the wording of the Railway Labor Act, as well as from the interpretation given its express terms by this Court, that the Railway Labor Act is not a "regulatory" enactment in the strict sense of the word, but rather, a *means*, supplying a general framework by which the railroads and their employees can avoid an impasse which might affect interstate commerce. As stated in Justice Pomeroy's dissenting opinion in the Pennsylvania Supreme Court below (J.S., 13):

> ". . . Its purpose is 'to encourage collective bargaining by railroads and their employees in order *to prevent, if possible, wasteful strikes and interruptions* of interstate commerce . . .'. *The Detroit and Toledo Shoreline Company v. United Transportation Union*, 396 U.S. 142, 148, 24 L.Ed.2d 325, 331 (1969). . . ." [Emphasis Added].

Act No. 43, on the other hand, seeks merely to regulate a local social condition – the frequency by which Pennsylvania railroad employees are to receive their wages. Patently, Act No. 43 does not even touch upon the same field circumscribed by the Railway Labor Act.

Nevertheless, these two railroads would urge this Court that the Railway Labor Act preempts Act No. 43. However, such an argument cannot be sustained unless it is presumed: 1) that contrary to the interpretation given the Railway Labor Act in *Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad Co., supra*, the Railway Labor Act provides not a *means*, but rather, a system of regulation, and 2) that this presumed regulation provides for the frequency by which railroad workers are to be paid their wages. Not only is this presumption – upon – presumption without a shred of evidence to support it, but such an argument flies into the face of the principle espoused by this Court in *Florida Lime, supra*, at 142:

> "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusions, or that Congress has unmistakenly so ordained."

Thus, when the economic and social welfare of the individual railroad employee depends upon the local and regional economic and social milieu which immediately surrounds him, there is no reason to preempt state jurisdiction in the absence of a direct conflict.

Appellants, however, would not only eschew the clear language of *Florida Lime, supra*, but would assert the doctrine of preemption in the face of the fact that this Court has closely scrutinized the question and has found in unmistakeable terms that there is no preemption where there is no actual conflict.

In *Terminal Ass'n. v. Trainmen*, 318 U.S. 1 (1943), the Supreme Court decided that a state regulation requiring that a caboose be attached to the rear of every train running throughout the State of Illinois did not constitute an undue burden on interstate commerce. With reference to the Railway Labor Act, *Terminal* provided in pertinent part:

> "The question is *whether the Railway Labor Act, so interpreted, occupied the field to the exclusion of the state action* under review. We conclude that *it does not*. . . . We hold that the enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves and did not preclude the State of Illinois from making the order in question." [Emphasis added].

See also, *Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad Co., supra; In re Chicago North Shore & M. R. Co.*, 147 F.2d 723 (1945).

It should also be noted that when the carriers and the railroad unions reached an impasse as to the number of men to be on a train crew, Congress passed Public Law 88-108 which, in effect, amended the Railway Labor Act to require that such number be determined by binding arbitration. In *Brotherhood of Locomotive Engineers v. Chicago R. I. & P. R. Co.*, 382 U.S. 423 (1966), this Court held that this extension of the Railway Labor Act, which extension had the effect of requiring binding arbitration as to the size of train crews in Arkansas and elsewhere, did not preempt the law of Arkansas which regulated the number of men comprising a crew on an interstate train in Arkansas.

It is not possible to state the the operation and scheme of the federal statute – the Railway Labor Act – precludes

Pennsylvania Act No. 43 from operating within its own field without an actual conflict existing between the two statutes.

Appellants' objection to this conclusion is that the majority in the Pennsylvania Supreme Court below contradicted themselves by stating that the Railway Labor Act was both comprehensive and not comprehensive in its scope. Contrary to this assertion by appellants, the Court below stated, "Thus, there is no pervasive regulation of the field in which Act No. 43 operates . . . ." [Emphasis added, J. S., A14). Obviously, both Act No. 43 and the Railway Labor Act each circumscribe a field of operation. Thus, the Court was expressly referring to the field of operation circumscribed by Act No. 43, not that of the Railway Labor Act. Therefore, no contradiction exists.

A state statute and a federal statute will generally circumscribe *two* fields of operation, regardless of the fact that the federal statute is comprehensive within its own field. This Court stated in *Florida Lime, supra*, 373 U.S. 143 at 144-45:

> "It is true that more recently we sustained a federal statute broadly regulating the production of renovated butter. But we were scrupulous in pointing out that a State might nevertheless – at least in the absence of an express contrary command of Congress – confiscate or exclude from market the processed butter which had complied with all the federal *processing* standards, 'because of a higher standard demanded by a state for its consumers.' A state regulation so purposed was, we affirmed, 'permissible under all the authorities.' Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 162, 62 S. Ct. 491, 499, 86 L.Ed. 754. That distinction is a fundamental one, which illumines and delineates

the problem of the present case. Federal regulation by means of minimum standards of the picking, processing, and transportation of agricultural commodities, however comprehensive *for those purposes* that regulation may be, does not of itself import displacement of state control over the distribution and retail sale of those commodities in the interests of the *consumers* of the commodities within the State. Thus, while Florida may perhaps not prevent the exportation of federally certified fruit by superimposing a higher maturity standard, nothing in Cloverleaf forbids California to regulate their marketing. Congressional regulation of one end of the stream of commerce does not, *ipso facto*, oust all state regulation at the other end." [footnotes omitted].

Likewise, the argument that Act No. 43 does not relate to health and safety, and thus must be preempted by the Railway Labor Act, is without merit. Heavy reliance for the health and safety argument is placed upon *California v. Taylor*, 353 U.S. 553 (1957); and *United Air Lines, Inc. v. Industrial Welfare Commission*, 211 Cal. App.2d 729, 28 Cal. Rptr. 238 (1963). Neither case, however, supports such a contention.

Taylor held that a statute denying state employees collective bargaining rights was superseded as to employees of a state-owned railroad by the Railway Labor Act. The state statute before the court in *Taylor* was in direct conflict with the procedures required by the Railway Labor Act, and attempted to substitute alternate procedures in the field specifically regulated by the Railway Labor Act: the settling of labor disputes. Thus, compliance with the California law would have directly and expressly denied railroad employees

the means prescribed by the Railway Labor Act for settling disputes – collective bargaining. Here, compliance with Act No. 43 in no way precludes or interferes in any way with the use of collective bargaining. As stated clearly, with strength and logic in the dissenting opinion of the Commonwealth Court below (J.S., A36-37):

> "Act No. 43 does not interfere with the expressed purposes of the Railway Labor Act and in no way affects the means by which agreement may be reached between parties with respect to wages, hours, or working conditions. Even in situations where the statute is effective, the parties are still free to bargain over the matter of pay periods and are not compelled to reach any particular agreement thereon, and the statutory pay period can be changed or continued in effect by agreement of the parties.
>
> "Act No. 43, it seems to me, does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Railway Labor Act, and this interpretation is in no way in conflict with the reasoning in *Detroit and Toledo Shore Line Railroad Company v. United Transportation Union*, 396 U.S. 142 (1969). That case was not concerned with retaining the status quo *per se* as applied to working conditions but only with obliging the parties not to change the status quo while the procedures of the Railway Labor Act for settling disputes were being exhausted. As such, that policy retained the act's primary objective, *i.e.*, the prevention of strikes, an objective that will not be affected by the operation of Act No. 43."

In *United*, the Supreme Court of California found that a state law requiring that airlines pay for stewardess uniforms violated the collective bargaining requirement of the Railway Labor Act. The state law before the court in *United* provided as follows:

> "No employee shall be required to contribute directly or indirectly from wage for the purchase or maintenance of uniforms. The term 'uniform' includes wearing apparel and accessories of distinctive design or color required by the employer to be worn by the employee as a condition of employment." 8 Cal. Admin. Code § 11460(9)(a).

The California law under question in *United* nowhere expressly provided that it *not* be applicable if it conflicted with a labor agreement, as is expressly provided in Act No. 43.

Assuming that the California law was indeed unconstitutional, and we have certain reservations as to this, it did remove the cost of uniform problem completely from the field of labor negotiations. Act No. 43 does not even purport to do this as it expressly provides that *any* solution reached through the machinery of the Railway Labor Act will be legally acceptable in Pennsylvania.

Taylor and *United*, both California cases, show California's bent for deciding all preemption questions on a health and safety basis. However, there are a plethora of cases involving the preemption question which have no direct and indeed no indirect bearing on health and safety. See *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963) (racial discrimination in employment); *International Union v. Russell*, 356 U.S. 634 (1958) (concurrent jurisdiction – unfair labor practices); *Cities Service Co. v. Peerless Co.*, 340 U.S. 179 (1950) (minimum prices

on the sale of local natural resources); *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1944) (foreign corporation's right to bring action in state court).

Perhaps misled by the reasoning in the California cases, appellants would establish a new test for preemption, that if the object of the state law is not to promote either health or safety, it must give way to the federal law whether or not there is any actual conflict.

This would clearly be at odds with *Florida Lime*, which emphasized parenthetically at 144:

> ". . . the maturity of avocados is a subject matter of the kind this Court has traditionally regarded as properly within the scope of state superintendence. Specifically, the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern. Many decades ago, for example, this Court sustained a State's prohibition against the importation of artificially colored oleomargarine (*which posed no health problem*), over claims of federal preemption and burden of commerce." *Plumey v. Massachusetts*, 155 U.S. 461 (1894). [Emphasis added].

The scheme and operation of the Railway Labor Act cannot be said to preclude the operation of Act No. 43 without actual conflict.

B. **Supremacy**

This Court in *Perez v. Campbell*, 402 U.S. 637, 644 (1971), delineated the test to be applied where state law is thought to be in conflict with federal law:

> "Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict."

Contrary to the railroads' position and Judge Roger's observation in the Commonwealth Court below [J.S., 9-10], the test is not whether the federal and state laws *might be* in conflict, but rather, whether or not they actually *are* in conflict.

If the railroads urge that a conflict is created by the *effects* of the two statutes, then they present this Court with a frivolous issue, as noted above. However, if these railroads urge that a conflict of *purposes* is created, then they present an argument of even less merit.

In enacting the Railway Labor Act, Congress "produced its machinery for conciliation, mediation, arbitration, and adjustments of disputes. A primary purpose of this machinery of railway government is to avoid any interruption to commerce or to the operation of any carrier engaged therein." *California v. Taylor, supra*, at 566.

The objectives and operation of the Railway Labor Act were also summarized in *Terminal Ass'n. v. Trainmen, supra*, 318 U.S. at 5:

> "The purpose of this Act is declared to be to provide 'for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions'. It places upon carriers and employees the duty of exerting every reasonable effort to settle these disputes by agreement, and prohibits the carrier from altering agreed rates of pay, rules or working conditions except in the manner provided by the agreement or by the Act itself. Machinery is set up for the adjustment, mediation, and arbitration of disputes which the parties do not succeed in settling among themselves."

Thus, the primary purpose of the Railway Labor Act is to provide a means – collective bargaining – by which agreement on disputes concerning rates of pay, rules or working conditions may be settled promptly in order to avoid an interruption of interstate commerce. Act No. 43 provides in relevant part:

> "*Unless otherwise stipulated in the contract of hiring or in the applicable labor agreement*, every common carrier by railroad or corporation or joint stock association operating a steam, electric or diesel surface railroad, or engaged in the sleeping car business, or carrying on the business thereof by lease or otherwise, shall pay once each week, to each employee, the wages earned for the seven-day period ending not more than fourteen days prior to such payment." [Emphasis added].

The Act, on its face, is totally inoperative if "a labor agreement" is applicable. Thus, Act No. 43 acknowledges the superiority of the Railway Labor Act and gives way to the collective bargaining prescribed by the Railway Labor Act.

In *California v. Taylor*, at 560 the Supreme Court said:

> "effective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules and working conditions."

Under Act No. 43 railroad employees and railroads still have the right to bargain as to pay periods. If they do so bargain and reach agreement, Act No. 43 will give way and not be operative.

Compliance with the provisions of Act No. 43 does not result in conflict with the Railway Labor Act unless it interferes with the *procedures* by which employer/employee agreements are to be reached, for the Railway Labor Act was not intended to preempt the field of regulation of working conditions themselves.

Thus, Act No. 43 does not interfere with the express purposes of the Railway Labor Act. Act No. 43 in no way affects the *means* by which agreement may be reached between parties with respect to wages, hours, or working conditions. Even in situations where the statute is effective, the parties remain free to bargain over the matter of pay periods. They are not compelled to reach any particular agreement thereon, and the statutory pay period can be changed or continued in effect by agreement of the parties.

The only conceivable conflict which could arise between Act No. 43 and the Railway Labor Act must fall within the extended scope given to the latter by this Court in *Detroit & T. S. L. R. R. v. United Transportation Union*, 396 U.S. 142 (1969). In that case, this Court declared that the Railway Labor Act requires not only compliance with any collective bargaining agreement between the parties, but also requires

preservation of the "actual objective working conditions which were in effect prior to the time the dispute arose and which are involved in or related to that dispute."

However, the "actual objective working conditions which were in effect prior to the time the dispute arose" did not arise out of practice, custom, or implied agreement, but were supplied by another Pennsylvania statute – the Act of 1913, *supra*. Appellants are apparently quite willing to abide by the Act of 1913 which is strikingly similar to Act No. 43. The Act of 1913 provides in relevant part:

> "Unless otherwise stipulated in the contract of hiring, each person, firm or corporation employing any person other than at an annual salary, shall pay to such person his or her earnings or wages semi-monthly. The first payment shall be made between the first and fifteenth day of each month, and the second payment shall be made between the fifteenth and the last day of each month. 1913, April 24, P.L. 114 § 1."
>
> "Nothing in this act shall prohibit the payment of wages or earnings oftener than semi-monthly. 1913, April 24, P.L. 114 § 3."

We point out that the only difference between the two statutes (Act. No. 43 and the Act of 1913) is simply 8 days.

There is no conflict between the Railway Labor Act, and Pennsylvania Act No. 43 or the similar Pennsylvania 1913 Act which these appellants and the railroads in Pennsylvania have complied with over the years.

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depends do not present a substantial federal question, and are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Pennsylvania.

Respectfully submitted,

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